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Marilyn F. Drees

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Do State Legislatures Have a Role in Resolving the "Just Compensation" Dilemma? Some Lessons from Public Choice and Positive Political Theory

Cover Page Footnote

Assistant Professor, University of Alabama School of Law. B.A., University of Alabama, 1981; J.D., Stanford Law School, 1984. The author gratefully acknowledges research support from Dean Kenneth C. Randall and the University of Alabama Law School Foundation, as well as diligent research assistance by Jason Pierce, Sarah Ames, Matt Franklin, Kimberly Staggs, Pete Bond, and Will McCarty. Ms. Dana Harris of Defenders of Property Rights, Ince., also provided exceptional help with state legislation. Finally, thanks to Professors Bill Brewbaker, John Dzienkowski, Norman Stein, Bill Andreen, Bryan Fair, Wythe Holt, and Pam Bucy for thoughtful comments on previous drafts.

DO STATE LEGISLATURES HAVE A ROLE IN RESOLVING THE "JUST COMPENSATION" DILEMMA? SOME LESSONS FROM PUBLIC CHOICE AND POSITIVE POLITICAL THEORY

Marilyn F. Drees*

INTRODUCTION

THE final clause of the Fifth Amendment admonishes: "nor shall private property be taken for public use, without just compensation."¹ This Just Compensation Clause provides an outer boundary of private property regulation by government at all levels. Recently, the Fifth Amendment's allure as a weapon to protect private property against government regulation has spread among the general public. The protection of endangered species' habitats, the preservation of wetlands, the limitations on development for flood and erosion control, to name a few obvious examples, have upset traditional notions of what a landowner could do with his land. A steady constriction of the range of uses permitted landowners, especially owners of environmentally sensitive land, coupled with expansion of the complex bureaucratic procedures to obtain permission to develop land, have fueled intense resentment among affected owners.² The current surge

* Assistant Professor, University of Alabama School of Law. B.A., University of Alabama, 1981; J.D., Stanford Law School, 1984. The author gratefully acknowledges research support from Dean Kenneth C. Randall and the University of Alabama Law School Foundation, as well as diligent research assistance by Jason Pierce, Sarah Ames, Matt Franklin, Kimberly Staggs, Pete Bond, and Will McCarty. Ms. Dana Harris of Defenders of Property Rights, Inc., also provided exceptional help with state legislation. Finally, thanks to Professors Bill Brewbaker, John Dzienkowski, Norman Stein, Bill Andreen, Bryan Fair, Wythe Holt, and Pam Bucy for thoughtful comments on previous drafts.

1. U.S. Const. amend. V. The Supreme Court made the amendment binding on the states through the Fourteenth Amendment in *Chicago Burlington & Quincy Railroad v. Illinois*, 200 U.S. 561 (1906). For convenience, this portion of the Fifth Amendment will be referred to in this article as the "Just Compensation Clause" or simply the "Fifth Amendment."

2. Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 Fla. St. U. L. Rev. 315, 327-31 (1996); David Foster, *Property Rights Soars to New Heights*, Chi. Trib., Aug. 19, 1995, § 4 (Home Guide) at 1, 2 ("The whole property-rights movement is a backlash to being sat on for too long by the government," Alan Riggs says." Riggs was arrested for failing to preserve properly a bald eagle habitat on his lot.); Bill Lambrecht, *Florida's Property Rights Law, Born of Fear, Worries Officials*, St. Louis Post-Dispatch, July 9, 1995, at 6A (describing property rights laws as arising from antigovernment sentiment). In explaining state and federal legislative interest in private property protection, Sen. Larry Craig (R-Idaho) said, "We're not out to pillage the environment, but what we're seeing now is environmental extremism. What we'll be talking about is moving

of protectionism toward private property is largely a response to the expansion and enforcement of land use regulations.³ Large and small landowners commonly raise a Fifth Amendment "regulatory taking" objection when a federal, state, or local law or rule has impinged on their ability to use their land.⁴

Since its adoption, the Fifth Amendment has been universally applied to physical invasions or appropriations of land by the government.⁵ Seventy-five years ago, in *Pennsylvania Coal Co. v. Mahon*, the Supreme Court recognized that a regulation that went "too far" would constitute a taking.⁶ Since then, however, the Court has made minimal progress in demarcating the distance that would be "too far." Instead, the Court has offered a shifting array of factors and categories derived from fact-intensive analyses, making it difficult to predict the outcome of a given case.⁷ Perhaps impatient with the lack of protection afforded by the courts,⁸ many state legislatures have passed legislation that mandates explicit consideration of the impact of regulations on private property.⁹ These statutes, and the debates sur-

the pendulum back to the center." *'Nightmare on Main Street'? GOP to Push Property Rights*, Ariz. Repub., Dec. 11, 1994, at B7.

3. Foster, *supra* note 2, at 2 (stating that the huge regulatory regime, especially environmental rules, has landowners "screaming for help"); Stefanie Scott, *Lengthy Shakeout Expected on Regulatory Takings Law*, San Antonio Express-News, Sept. 8, 1995, available at 1995 WL 9501255 (stating that the Texas compensation law grew from opposition to a proposal to designate a habitat for endangered golden-cheeked warbler); Steve Yozwiak, *Prop. 300 Rejected; Trap Ban Approved, No Raise for Lawmakers*, Ariz. Repub., Nov. 9, 1994, at A12 ("Conservatives nationwide have used the property-rights issue to challenge environmental regulations.").

4. "Regulatory taking(s)" will be used in this article to describe the concept that a regulation is sufficiently restrictive to give rise to a right of compensation for an owner whose land is affected by the regulation.

5. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 798 (1995).

6. 260 U.S. 393, 415 (1922).

7. Most modern commentators on the Just Compensation Clause begin or end with a discussion of the Supreme Court's confusing treatment of private property. See, e.g., Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* ix-x (1985); Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 Const. Commentary 259, 259-60 (1992); Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 Harv. J.L. & Pub. Pol'y 147 (1995); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984); Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1081 (1990); Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 Can. J.L. & Juris. 161, 165-67 (1996).

8. Uncertainty caused by the murkiness of regulatory takings jurisprudence and impatience with the slow pace of legal developments in the courts probably added motivation for the legislative movement. Scott Allen, *Land Grab: Property Rights Challenges are Raising the Ante in Environmental Protection*, Boston Globe, Dec. 11, 1995, at 29, 31 ("Jerold Kayden, a professor in the graduate school of design at Harvard University, argues that the property rights movement turned to politics primarily because it has not made progress with the courts.").

9. The question of the propriety of state versus federal legislation raises complex and substantial federalism concerns that are beyond the scope of this article. As a practical matter, issues concerning the role of state legislatures are more pressing,

rounding them, have brought into sharper focus the fundamental question of whether courts can, or should, solve the regulatory takings puzzle alone.

This new legislative interest shifts the focus of the regulatory takings question from the best way for judges to decide the question to *whether* judges should decide the question. Much analysis of regulatory takings takes the view that a choice must be made between the legislature and the judiciary. This article, using lessons from public choice and positive political theory, suggests that a better focus would be to determine whether the work of two institutions produces a better result than the work of one; the efforts of the legislature can complement those of the courts to produce a clear, fair resolution of the just compensation dilemma. Part I of this article traces modern Just Compensation Clause jurisprudence. Part II offers an overview of the recent state legislation, along with a brief consideration of the reasons for which the regulatory takings question is a matter for the states. Part III discusses the difficulty of choosing the appropriate decisionmaker for property rights issues, first summarizing the prevalent theories of institutional choice, loosely gathered under the headings of public choice and positive political theory, then suggesting a variant institutional choice analysis. This variant is based not on the choice between institutions, but rather on the choice of the sequence of institutional decisions. The alternative analysis yields a more sensible analytical approach to property rights protection. Part IV offers guidance for state legislatures in structuring statutes to comport with the core notion of fairness that underlies the Fifth Amendment and to provide greater clarity and certainty for landowners and government officials.

I. FIFTH AMENDMENT JURISPRUDENCE

A. *Early Supreme Court Treatment: From Pennsylvania Coal to Penn Central*

Pennsylvania Coal established the foundation¹⁰ for the proposition that a law or regulation could violate the Just Compensation Clause simply because of limitations it placed on an owner's use of his prop-

since twenty-five states have passed some sort of property rights laws. The United States Congress has considered property rights legislation, but has never passed any. Late last May, Sen. Orrin Hatch introduced S. 781, a comprehensive property rights bill virtually identical to the one introduced by then Sen. Dole in the 104th Congress, S. 605. See S. 781, 105th Cong. (1997); S. 605, 104th Cong. (1995). S. 781 was referred to the Judiciary Committee and one hearing has been held so far, in October 1997. For a detailed critique of S. 605, see Frank I. Michelman, *Testimony Before the Senate Committee on Environment and Public Works, June 27, 1995*, 49 Wash. U. J. Urb. & Contemp. L. 1 (1996).

10. But see Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211 (arguing that regulatory takings were recognized in the nineteenth century, well before *Pennsylvania Coal*).

erty.¹¹ The case involved an injunction sought by the Mahons to prevent the coal company's mining activities under their home. They relied on the Kohler Act, passed by the Pennsylvania legislature in 1921. The Kohler Act prohibited mining activities that would cause sinking of homes, commercial buildings, public buildings or streets, or other public facilities.¹² The company argued that the Kohler Act deprived it of property, specifically the coal in the "support estate," a separate estate recognized by Pennsylvania law in the pillars of coal that supported the surface.¹³ Justice Holmes, writing for the majority, agreed that the Kohler Act violated the Fifth Amendment. He advanced a number of criteria which could be considered in determining the existence of a Fifth Amendment violation. Conceding that "[g]overnment could hardly go on" if payment was required for every change in the law that affected property, Holmes nevertheless noted that when diminution of value "reache[d] a certain magnitude, in most if not in all cases there must be . . . compensation to sustain the act."¹⁴ According to Holmes, the outcome would depend on specific facts in a case, one of which would be the extent of diminution of value.¹⁵ Holmes also characterized the case as concerning "a single private house," which did not sufficiently affect the public interest to warrant the destruction of the company's rights in the support estate.¹⁶ In distinguishing a previous Pennsylvania case, which required companies with adjoining mines to leave pillars of coal along property lines to avoid mine cave-ins, Holmes pointed out that the burden secured "an average reciprocity of advantage" for the companies and their em-

11. Before 1926, the Court had already considered a number of cases involving absolute prohibition of certain activities and had upheld them as valid exercises of police power. *See, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibition of brick kiln operation in specified zone); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (prohibition of livery stable in downtown area); *L'Hote v. City of New Orleans*, 177 U.S. 587 (1900) (regulation of prostitution); *Mugler v. Kansas*, 123 U.S. 623 (1887) (state statute prohibiting the manufacture and sale of alcoholic beverages); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878) (prohibition of fertilizer operations). Many of these cases were based on the Fourteenth Amendment protection against deprivation of property without due process of law; indeed, several were decided before the Supreme Court "incorporated" the Fifth Amendment in 1906. *See supra* note 1. The police power analysis continues to be an important part of Fifth Amendment analysis, however, and these cases helped foster the presumption that nuisances or activities with attributes of nuisance could be severely restricted or even outlawed by the government with impunity.

As this footnote indicates, this part does not purport to be an encyclopedic recapitulation of every property deprivation claim ever considered by the Court. Instead, it highlights the cases that have proven important in the regulatory takings debate.

12. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416-17, 421-22 (1922) (Brandeis, J., dissenting).

13. *Id.* at 414.

14. *Id.* at 413.

15. *Id.*

16. *Id.* at 413-14.

ployees which could justify the restriction on mining.¹⁷ Holmes concluded by reiterating that the issue of when a regulation goes "too far"¹⁸ and becomes a taking "is a question of degree—and therefore cannot be disposed of by general propositions."¹⁹

After sketching the contours of the new regulatory takings analysis, the Supreme Court fell silent for four years, until it considered a Fifth Amendment challenge to a comprehensive zoning scheme in *Village of Euclid v. Ambler Realty Co.*²⁰ Ambler Realty sought invalidation of the city's entire zoning ordinance, claiming that the imposition of the zoning ordinance reduced the value of its property by at least two-thirds.²¹ Justice Sutherland's majority opinion cautioned that "[t]he line which in this field separates the legitimate from the illegitimate assumption of [police] power is not capable of precise delimitation. It varies with circumstances and conditions."²² The Court sustained the segregation of commercial and residential uses in different zones, finding that the creation of exclusively residential zones was rationally related to public health and safety, and reducing traffic, noise, congestion, and other nuisance-like byproducts of intense commercial use.²³

In 1928, the Court again considered a zoning challenge in *Nectow v. City of Cambridge*.²⁴ Unlike Ambler Realty in the previous case, Nectow conceded the general validity of the ordinance but specifically challenged the inclusion of his property in a residential zone. This time, the Supreme Court relied on the specific factual findings of the court-appointed master that the city's choice of the zoning boundary was not substantially related to public health, safety, or welfare.²⁵ In the absence of a valid exercise of police power, the Court held the ordinance unconstitutional *as applied to* Nectow's property.²⁶

After its contrasting opinions on zoning, the Court did not take up the regulation of real property again for nearly half a century. *Penn Central Transportation Co. v. New York City* concerned the constitutionality of New York's historic preservation ordinance.²⁷ It offered a modern synthesis of the fact-specific, multifactor analyses gleaned from the late 19th and early 20th century cases. In *Penn Central*, the Court conceded early that defining "'taking' for purposes of the Fifth

17. *Id.* at 415.

18. *Id.*

19. *Id.* at 416.

20. 272 U.S. 365 (1926).

21. *Id.* at 384.

22. *Id.* at 387.

23. *Id.* at 394-95.

24. 277 U.S. 183 (1928).

25. *Id.* at 187-88.

26. *Id.* at 188-89.

27. 438 U.S. 104 (1978).

Amendment has proved to be a problem of considerable difficulty."²⁸ Justice Brennan's majority opinion identified three factors that had come to be important in "these essentially ad hoc, factual inquiries": (1) economic impact, notably interference with "distinct investment-backed expectations"; (2) character of the action (i.e., physical invasion versus general or specific regulation); and (3) advancement of public health, safety, and welfare.²⁹ The *Penn Central* majority also carried forward the tradition of deference to state and local lawmakers in analyzing the purposes and effects of the law.³⁰ Because the preservation law advanced public health and welfare,³¹ did not deprive Penn Central completely of the use of its property or the airspace above it,³² and did not uniquely burden property owners like Penn Central without any compensating benefit,³³ the preservation ordinance was sustained.³⁴

B. *The Modern Muddle*³⁵

The next fifteen years saw a variety of analytical frameworks used with a concomitant variety of outcomes. In 1979, for example, the Court reached two opposite results in a week. First, in *Andrus v. Allard*,³⁶ Justice Brennan, the author of *Penn Central*, wrote for a nearly unanimous court³⁷ that the federal law and regulations prohibiting the sale of eagles and eagle parts did not violate the Just Compensation Clause.³⁸ Although the law admittedly deprived owners of the most profitable use of their property, the sale of eagles and products made with eagle feathers, they were otherwise fully able to keep or dispose of the property.³⁹ The elimination of one stick in the property rights bundle of sticks was not sufficient to prove a taking; the bundle must be viewed in the aggregate.⁴⁰

Seven days later, in *Kaiser Aetna v. United States*,⁴¹ Justice Rehnquist found the deprivation of a single stick—the right to exclude others—to be sufficient to trigger the Just Compensation Clause.⁴² The Court held that the Army Corps of Engineers could not, without

28. *Id.* at 123.

29. *Id.* at 124-25.

30. *Id.* at 125-27.

31. *Id.* at 129.

32. *Id.* at 130-31.

33. *Id.* at 134-35.

34. *Id.* at 138.

35. See Rose, *supra* note 7, at 561.

36. 444 U.S. 51 (1979). The decision date was Nov. 27, 1979.

37. The decision was unanimous, but the opinion was not because Chief Justice Burger concurred in the judgment. *Id.* at 68.

38. *Id.* at 67-68.

39. *Id.* at 66.

40. *Id.* at 65-66.

41. 444 U.S. 164 (1979). The decision date was December 4, 1979.

42. *Id.* at 179-80.

compensation, compel the owners of a private marina, who had dredged a channel to connect the marina to a public waterway, to open the marina to the public.⁴³

In 1980, the Court revisited the "ad hoc" analysis of *Penn Central* and its predecessors in *Agins v. City of Tiburon*.⁴⁴ The *Agins* decision retained the fact-specific balancing of public interest and private burden,⁴⁵ but appeared to telescope all the various factors and considerations into a two part test; a taking would occur if a law "[did] not substantially advance legitimate state interests . . . or denie[d] an owner economically viable use of his land"⁴⁶

The next major development occurred in 1982, when the Court broke from its case-by-case, fact-by-fact formula to announce a category of *per se* taking: "permanent physical occupation."⁴⁷ In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court declared unconstitutional a New York law that prohibited a landlord from (1) stopping the installation of cables for cable television on his apartment building roof or (2) collecting from the cable companies any fee in excess of the amount set by a state commission.⁴⁸ According to the Court, the installation of cables and cable boxes on an apartment building roof was a "permanent physical occupation of property," which had always been characterized as a taking.⁴⁹

The dissatisfaction with judicial deference to lawmakers and regulators which had bubbled up in *Kaiser Aetna* and simmered in several previous dissents came to the fore in 1987. Although the Court, in *Keystone Bituminous Coal Association v. DeBenedictis*,⁵⁰ followed the *Penn Central* multifactor balancing analysis to sustain a Pennsylvania statute limiting coal mining to prevent subsidence, Justice Stevens' opinion drew a stinging dissent from Chief Justice Rehnquist and three colleagues.⁵¹ Rehnquist complained that the majority deferred too much to the legislature and did not examine thoroughly whether the claimed public purpose of the law was sufficient to avoid compensation.⁵² In addition, Rehnquist criticized the majority for reading the early "prohibition of nuisance" cases too broadly, while paying inadequate attention to the total destruction of the coal company's property interest in the support estate.⁵³

43. *Id.* at 178-80.

44. 447 U.S. 255 (1980).

45. *Id.* at 261.

46. *Id.* at 260.

47. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982). In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court specifically limited *Loretto*'s *per se* rule to physical invasions of property. *Id.* at 538-39.

48. *Loretto*, 458 U.S. at 423 n.3.

49. *Id.* at 441.

50. 480 U.S. 470 (1987).

51. *Id.* at 506.

52. *Id.* at 510-11 (Rehnquist, C.J., dissenting).

53. *Id.* at 511-15 (Rehnquist, C.J., dissenting).

Rehnquist wrote again, this time for the majority, in *First English Evangelical Lutheran Church v. County of Los Angeles*.⁵⁴ Although it did not revise the regulatory takings test, the opinion was highly significant because of the holding that compensation was a required remedy under the Fifth Amendment, even for temporary regulatory takings.⁵⁵ If a regulation was invalidated as a taking, the owner was entitled to compensation for the period of time before invalidation when it was enforced against him.⁵⁶

Justice Scalia tightened the first prong of the *Agins* test in *Nollan v. California Coastal Commission*⁵⁷ by requiring that a condition imposed on a building permit could not be considered to "substantially advance[] legitimate state interests"⁵⁸ unless there was a clear "nexus" between the condition imposed and the asserted state interest.⁵⁹ A few years later, Justice Rehnquist attempted to clarify the scope of that required nexus in *Dolan v. City of Tigard*.⁶⁰ According to Rehnquist, the burden was on the government to make an "individualized determination" demonstrating a "rough proportionality" between the government's requirement and the impact of the owner's proposed project.⁶¹ The proof would not require "precise mathematical calculation," but something more rigorous than a conclusory statement about the possible effects of the project was needed.⁶²

Justice Scalia's other notable contribution to takings jurisprudence came in *Lucas v. South Carolina Coastal Council*.⁶³ In *Lucas*, Mr. Lucas claimed, the trial court found, and Scalia's majority opinion accepted without quibble, that he was deprived of all economically beneficial use of his property when the Coastal Council designated it as part of an erosion area in which building was prohibited.⁶⁴ Scalia explained⁶⁵ that the deprivation of all economically beneficial use was not just the second prong of the *Agins* analysis, but an independent category of takings *per se*.⁶⁶ Unless the government could prove that its restrictions on use "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership," any law that deprived an owner

54. 482 U.S. 304 (1987).

55. *Id.* at 318.

56. *Id.* at 322.

57. 483 U.S. 825 (1987).

58. *Id.* at 834 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

59. *Id.* at 836-37.

60. 512 U.S. 374, 386 (1994).

61. *Id.* at 391.

62. *Id.* at 395-96.

63. 505 U.S. 1003 (1992).

64. *Id.* at 1020.

65. According to Justice Blackmun, Justice Scalia actually created a *per se* category that was not recognized in *Agins*. See *id.* at 1046-47 (Blackmun, J. dissenting).

66. *Id.* at 1015-16.

of all economically beneficial use would violate the Fifth Amendment.⁶⁷

After nearly a century of efforts to define regulatory takings, the Court has laid a remarkably unsteady foundation. One noncontroversial *per se* rule has emerged: a law or regulation permitting a physical invasion of property violates the Fifth Amendment. Any action outside of a physical invasion is open to vigorous debate. Even the other *per se* category established in *Lucas*—loss of all economically beneficial use—is uncomfortably fuzzy at the boundaries. First, the determination of "all" is hardly a precise mathematical calculation. Even before commencing the arithmetic, the court must define the extent of the affected property interest. The court must then determine how much of it is gone in order to complete the calculation. Even if the calculation yields a total loss, the court cannot yet close the book. Instead, it must decide, based on "background principles" of state law, whether the rights that were lost were ever ownership rights in the first place.

Without a physical invasion or total economic loss, a judge must divine whether or not a regulation "substantially advance[s] legitimate state interests."⁶⁸ Although the Court discusses various factors in the context of that analysis from time to time, it ultimately offers little guidance on the weight or priority of any of them, and sends conflicting signals on the appropriate degree of deference to be given to the government.

Amid the confusion, there remains a recurring theme: fairness. The struggles in the regulatory takings cases reflect the Justices' efforts to ensure that social benefits and burdens are distributed equitably, if not necessarily evenly. This core notion of fairness was captured by Justice Hugo Black:

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.⁶⁹

This quotation has been repeated often in opinions.⁷⁰ Indeed, Chief Justice Rehnquist labeled it "axiomatic" when he quoted it in *First English*.⁷¹ The fairness rationale has been used for centuries to justify

67. *Id.* at 1029.

68. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

69. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

70. *See, e.g., Dolan*, 512 U.S. at 384; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).

71. 482 U.S. 304, 318-19 (1987).

compensated takings—that is, eminent domain.⁷² Frank Michelman, in his pathbreaking *Harvard Law Review* article, argued that fairness, or “evenhandedness,” was incorporated into the Court’s takings tests and “this [fairness] approach, indeed, derive[d] some indirect support from its power to explain much that is otherwise mysterious about the [takings] doctrines.”⁷³

Admittedly, fairness is a complicated concept, as regulatory takings jurisprudence has forcefully demonstrated. In regulatory takings, preventing individuals from being singled out to bear social burdens is a crucial element of fairness. Another important component, however, is clarity; clarity provides certainty, allowing landowners to know the boundaries of permissible government action in order to conform their own actions and properly confine their expectations. Even conceding that the Court has achieved some success with the first element, proportional burdens, it has failed with the second. Small wonder, then, that those in search of clarity might turn elsewhere.⁷⁴

72. See 1 William Blackstone, *Commentaries* *139; William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 583-84 (1972) (citing 17th century scholars Grotius, Pufendorf, de Vattel, and Van Bynkershoek).

73. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv. L. Rev. 1165, 1226 (1967); see also William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* 4-5 (1995) (noting that fairness has long been a justification for just compensation requirement and is useful in analyzing regulatory takings).

74. Turning to state courts would not solve the problem, although the law of every state includes some form of the just compensation requirement set forth in the Fifth Amendment. See Stoebuck, *supra* note 72, at 554-55 (stating that every state except North Carolina has a takings clause in its constitution, and North Carolina has judicially adopted the compensation requirement). Typically, state court litigants make regulatory takings claims based on federal and state law. State courts commonly cite the tests enunciated by the Supreme Court, without explaining very precisely whether the tests apply to state as well as federal claims. See, e.g., *Cannone v. Noey*, 867 P.2d 797 (Alaska 1994) (applying *Lucas*’ test for *per se* taking where federal and state claims were raised); *State Dep’t of Health v. The Mill*, 887 P.2d 993 (Colo. 1994) (applying federal Supreme Court tests for federal and state claims); *Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. 1996) (discussing *Lucas*’ total loss of value test, *Penn Central* factors, and harm-preventing rationale from *Mugler v. Kansas*, 123 U.S. 623 (1887), in the context of federal and state claims); *Board of Supervisors v. Omni Homes, Inc.*, 481 S.E. 2d 460 (Va. 1997) (reviewing *Lucas*’ *per se* rule and using *Penn Central* factors to analyze federal and state claims). Even in the uncommon case based solely on the state constitution, the tests employed seem quite similar to the Supreme Court tests. See, e.g., *Bauer v. Waste Management of Conn., Inc.*, 662 A.2d 1179 (Conn. 1995) (explaining that the state test was whether “practical confiscation” occurred, which the court conceded was no different from *Lucas*’ *per se* rule); *Quirk v. Town of New Boston*, 663 A.2d 1328 (N.H. 1995) (holding that the state rule did not permit a taking if the zoning regulation did not substantially destroy the value of property, which seems very close to the *Lucas* test).

The state courts offer no greater clarity than the federal courts. Indeed, based on the variations in analysis among courts, they may contribute greater confusion.

II. PROPERTY RIGHTS IN THE STATES

A. State Legislative Activity

The recent spate of Supreme Court regulatory takings opinions may have rekindled interest in the just compensation dilemma, but has had no widespread impact on property owners. More successful efforts focused closer to home, as legislators, encouraged by coalitions of property interests, seized the initiative in addressing regulatory takings. During the 1990s, twenty-six states⁷⁵ have passed bills relating to property rights protection.⁷⁶ The statutes can generally be divided into two categories.⁷⁷ The majority of the bills fall into the "assessment" category, which means they simply require public officials to consider whether or not any proposed rule would result in a taking. The others are "remedial"; they create a new process for obtaining compensation.⁷⁸ Each category will be considered in turn.

75. Arizona, Arkansas, Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. See State Appendix, *infra* note 76.

76. No two state statutes are identical, but many have common features; this section attempts to sketch the general contours of the current legislation. For more detail, consult the summary of the statutes included as an Appendix to this article [hereinafter, the "State Appendix"]. The State Appendix discusses all states except Mississippi, Nevada, New Mexico, North Carolina, and Oregon, which are summarized *infra* note 77. For a feature-by-feature analysis of state statutes, see Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 Ecology L.Q. 187, 204-15 (1997).

77. A few states fall outside the categories, but have singled out specific types of property for protection:

MISSISSIPPI created an inverse condemnation action for those engaged in "forestry activity." 1994 Miss. Laws 647. Curiously, the statute specifically excludes a "taking" under the Fifth and Fourteenth Amendments or the state constitution from the definition of "inverse condemnation." 1994 Miss. Laws 647, §§ 6(d)(1), 6(k). It does, however, permit an inverse condemnation action if forest land is reduced in value by more than forty percent. 1994 Miss. Laws 647, § 6(g).

NEVADA chose to safeguard water rights. 1995 Nev. Stat. 408.

NEW MEXICO also clarified that water rights would not be modified or taken away under the state's Water Quality Act. 1995 N.M. Laws 133.

NORTH CAROLINA protected those who cultivate shellfish along its coast by establishing a compensation action for anyone who believes the state "has deprived him of his private property rights in land under navigable waters or his right of fishery in navigable waters." 1994 N.C. Sess. Laws 717.

OREGON singled out historic preservation in a statute allowing landowners to escape from historic property designations. A landowner can refuse consent to the designation of her property as "historic," which would effectively halt any efforts to register the property in the National Register of Historic Places or otherwise label it in any permanent way. 1995 Or. Laws 693, § 21(1). She can also remove any historic designation placed on it by a local government. 1995 Or. Laws 693, § 21(3).

78. It is difficult to divide the categories neatly because the remedial statutes generally also contain assessment requirements. Those states with both assessment and remedial requirements are summarized in both parts of the State Appendix, with appropriate cross-references.

1. Assessment Statutes

The state statutes vary, but this section synthesizes typical provisions. Most statutes require the state attorney general or agencies to review proposed actions to avoid regulatory takings. Many require the state attorney general to develop guidelines for regulators to follow to avoid regulatory takings.⁷⁹ The guidelines are to be based on federal and state constitutional law and must be updated annually.⁸⁰ Agencies are required to consider the guidelines when drafting regulations and analyze the potential regulatory takings impact, usually in written form.⁸¹ Typically, the agency's analysis ends the process; however, in some cases, the state attorney general performs a final review.

Some statutes explicitly preclude any lawsuit based on the assessment law except suits against agencies for failure to prepare a takings impact analysis. Most say nothing about the final product, but a few make the assessment process and reports confidential.⁸²

2. Remedial Statutes

A smaller number of states provide remedial processes for aggrieved landowners, ranging from voluntary mediation to administrative review to a new cause of action against an agency. Because there are so few of them and, unlike the assessment statutes, they differ so markedly from each other, the state statutes will be summarized individually.

Arizona⁸³ created an administrative appeal before a hearing officer designated by the local government, but only for a "dedication or exaction" required of a landowner in connection with approval of his proposed development. If the exaction is not removed by the hearing officer, the landowner may go to court for a trial de novo.

79. These statutes are patterned closely after President Ronald Reagan's Executive Order No. 12,630. See 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (1994). The Executive Order required the Attorney General to draft guidelines for federal agencies and required the agencies to complete an analysis of the impact of proposed regulations on property rights. For a detailed discussion of the Executive Order and the agencies' responses to it, see Lynda L. Butler, *The Politics of Takings: Choosing the Appropriate Decisionmaker*, 38 Wm. & Mary L. Rev. 749 (1997).

80. A "taking" is generally defined as whatever would require compensation under the Fifth and Fourteenth Amendments—not all include the state constitution. See State Appendix, § A.

81. The scope of the state legislation varies. Some statutes cover state agencies only, but a few cover only *specified* state agencies. Other states limited their bills to local governments, while still others extend to state agencies and localities. *Id.*

82. Idaho and Indiana make the information subject to attorney-client privilege. See Idaho and Indiana in State Appendix, § A; Idaho Code § 67-8003(2) (1995); Ind. Code Ann. § 4-22-2-32(f) (Michie Supp. 1997).

83. See Arizona in State Appendix, § B; Ariz. Rev. Stat. Ann. § 9-500.12 (1996) (city), § 11-810 (West Supp. 1997) (county).

Idaho⁸⁴ similarly allows a landowner who would be adversely affected by a permit decision to request an administrative hearing. The landowner retains an option to go to court after exhausting administrative processes.

Maine⁸⁵ created a voluntary mediation program for aggrieved landowners who have exhausted their administrative remedies. Dissatisfied owners may still go to court after mediation.

Florida⁸⁶ enacted the most intricate scheme, establishing a mandatory administrative complaint process as a prerequisite to court action if a landowner believes he has been "inordinately burdened" by a state or local government decision. The statute explicitly characterizes the claim as a new cause of action, completely independent of any potential takings claim. Judicial review is available if the parties are unable to reach an administrative settlement.

Texas⁸⁷ also imposed a more detailed scheme, first by expanding the definition of "taking" beyond the state and federal constitutional standard to include any action that diminished the value of land by twenty-five percent. A landowner can file a complaint in district court against local governments, but must pursue an administrative complaint first against state agencies.

Despite the emphasis on the federal Constitution by property rights advocates and in most property rights statutes, the activist and legislative activities in the states have actually worked to insure that decisions about property rights will not be made by federal courts. As explained in part C, the justiciability and preclusion doctrines applied to takings disputes will mean that, with very rare exceptions, either state legislatures, state agencies, or state courts will determine the extent of property rights protections.

C. *Federal Ripeness Requirements will Keep the Cases in the States*

The Constitution confines the jurisdictional reach of the federal courts to "cases" and "controversies."⁸⁸ In addition to the strictures of Article III, judges have more general prudential concerns; in essence, they do not want to waste judicial resources and intangible judicial capital on abstract, speculative questions. The proper function of the courts is to resolve actual disputes for people who are actually harmed by them.⁸⁹ The justiciability doctrines, including ripeness,

84. See Idaho in State Appendix, § B; Idaho Code § 67-6521 (Supp. 1997).

85. See Maine in State Appendix, § B; Me. Rev. Stat. Ann. tit. 5, § 3341 (West Supp. 1996).

86. See Florida in State Appendix, § B; Fla. Stat. Ann. § 70.001 (West Supp. 1997).

87. See Texas in State Appendix, § B; Tex. Gov't Code Ann. § 2007.002(5)(B)(ii) (West Supp. 1996).

88. U.S. Const. art. III, § 2.

89. See *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659 (1997) (stating that Fifth Amendment ripeness analysis includes prudential as well as constitutional elements); see generally 13A Charles Alan Wright et al., *Federal Practice and Proce-*

have developed to permit judges to determine the appropriate cases to hear.⁹⁰ Ripeness, however, has taken on particular significance in the Supreme Court's Fifth Amendment jurisprudence.

The Supreme Court developed a two-part standard for determining whether or not a takings claim was ripe for review.⁹¹ The standard is based on the bifurcated nature of the Just Compensation Clause. Fifth Amendment violations require appropriation of private property *plus* failure to compensate; unless a claimant proves that both criteria are satisfied, her claim is not ripe.⁹²

dure § 3532.1, at 114-22 (2d ed. 1984) (describing constitutional and jurisprudential sources of ripeness doctrine).

90. See generally Wright et al., *supra* note 89, § 3532.1, at 130-34 (discussing ripeness in relation to justiciability doctrines of standing and mootness).

91. Note that there are two types of Fifth Amendment challenges. A landowner may claim that a regulation, "as applied" to a particular parcel of land, operates to deprive him of property without compensation. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (challenging specific regulations of a specific property). The second category is a "facial" challenge; the plaintiff claims that a law, simply by its enactment, inevitably and in all circumstances unconstitutionally deprives him of property. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519 (1992) (plaintiffs argued that ordinance was invalid no matter how it was applied). There is some confusion in the cases, and considerable disagreement among the commentators, about whether the ripeness requirement applies to "facial" challenges or only to "as applied" challenges. See Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop. L.J. 73, 82-83 (1988) (arguing that ripeness is inapplicable to facial claims); Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts will Go to Avoid Adjudicating Land Use Cases*, 10 J. Land Use & Envtl. L. 91, 102 (1994) (same); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 19 (1995) (same). But see Kenneth A. Ehrlich, *Reaping the Fruits of a Ripe Property Takings Challenge: Eliminating the Ripeness Problem in Facial Regulatory Takings Cases*, 30 Santa Clara L. Rev. 865 (1990) (arguing that ripeness is applicable to facial claims); R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 J. Land Use & Envtl. L. 101, 111-12 (1993) (noting that the Supreme Court has noted at least one circumstance when a facial claim is unripe); Thomas E. Roberts, *Fifth Amendment Takings Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law. 479, 488-92 (1992) (arguing that ripeness does and should apply to facial claims, but noting confusion in Supreme Court analyses). The Supreme Court devoted a short footnote to this point last term, but did not give a categorical answer. See *Suitum*, 117 S. Ct. at 1666 n.10 ("Such 'facial' challenges . . . are generally ripe the moment the challenged regulation . . . is passed . . .").

92. The Court detailed its ripeness test in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). In finding Hamilton Bank's claim unripe, the Court explained that it could not determine whether a taking had occurred until it knew the extent of the government's interference with the landowner's use of the land. *Id.* at 191-94. Unless and until the bank petitioned the zoning appeals board for the appropriate variances to overcome the planning commission's objections to the original development plan, and the appeals board issued a decision, the Court could not determine how extensively, if at all, the government had interfered with the bank's use. *Id.* at 193-94. In short, until the bank had sought regulatory approval at all levels, the government's decision could not be considered final.

Williamson County also identified a second ripeness requirement: the compensation petition. Noting that the state of Tennessee had a statutory procedure through which aggrieved landowners could seek compensation for inverse condemnation, the

Ironically, the actions that a landowner must take in the state system to ripen her federal claim will likely bar her from ultimately presenting her case before a federal district court.⁹³ To prosecute her compensation claim in state court, she must prove that the state did something improper and would be required to pay her for it. In making that claim, even if she confines herself to state law and does not raise federal constitutional issues, she runs a substantial risk that her federal claims will be barred from federal court under doctrines designed to limit repetitive litigation: *res judicata* and collateral estoppel.⁹⁴

The principles of *res judicata* and collateral estoppel can, and do, operate in these Fifth Amendment cases to prevent a second, federal adjudication of issues or claims arising out of the same occurrence.⁹⁵ The doctrines, though often paired, are independent bases for limiting or stopping litigation. In essence, *res judicata* will bar a litigant from raising, in a subsequent suit, any claims that are based on the same incident and were or could have been raised in the prior suit.⁹⁶ Collat-

Court mandated that the bank also pursue the state compensation remedy before bringing a federal claim. Because the Fifth Amendment did not prohibit all takings, but simply uncompensated takings, the Court reasoned, the bank's claim could not be ripe until the state refused compensation. *Id.* at 194-97.

93. See Stein, *supra* note 91, at 92-97.

94. See Roberts, *supra* note 91, at 484-88.

95. The federal courts have an additional statutory mandate concerning cases like these from state courts. 28 U.S.C. § 1738 provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State." Relying on § 1738, the Supreme Court has held that the *res judicata* and collateral estoppel doctrines apply to constitutional challenges commenced pursuant to 42 U.S.C. § 1983, the route regulatory takings cases would follow. See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75 (1984) (applying *res judicata*); *Allen v. McCurry*, 449 U.S. 90 (1980) (applying collateral estoppel).

The Supreme Court has also deferred to state agencies. The preclusion doctrines have been applied to state court proceedings reviewing state agency determinations. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982). They have also been applied to determinations made by a state agency acting in a "judicial capacity," unreviewed by a court. *University of Tennessee v. Elliott*, 478 U.S. 788, 797-99 (1986). Not all unreviewed state agency decisions, however, will be given preclusive effect. See generally Erwin Chemerinsky, *Federal Jurisdiction* § 8.10, at 511-13 (2d ed. 1994).

96. The Restatement (Second) of Judgments discusses the effect of a judgment on the original claim using the traditional "merger" and "bar." If the plaintiff prevails, all of his claims are "merged" in the judgment and he cannot later bring an action on all or any part of the claim (although he may maintain an action to enforce the judgment, if needed). Restatement (Second) of the Law of Judgments § 18 cmt. a (1982). Similarly, if the plaintiff pursues an action on the judgment obtained in the original case, the losing defendant cannot subsequently offer defenses he raised or could have raised in the original suit. See *id.* § 18 cmt. b. "Bar" protects defendants; a judgment in favor of the defendant bars a later action on the same claim by the losing plaintiff. *Id.* § 19. The determination of a "claim" for purposes of merger and bar—i.e. what the plaintiff or defendant raised or could have raised in the first suit—is a subtle, difficult question to which the Restatement devotes fifty-five pages, comprising three sections. See *id.* §§ 24-26; see generally, Wright et al., *supra* note 89, §§ 4407-08 (discussing definition of "claim" and offering illustrations).

eral estoppel deals with issues that were, in fact, litigated in a previous case.⁹⁷ In a later case, the second trial court is precluded from reopening any legal or factual issues that were "actually litigated and determined" and were "essential to the judgment" in the first case.⁹⁸

It would be extremely difficult, if not impossible, for an owner in state court to avoid the facts, issues or claims that would ultimately bar the federal Fifth Amendment action. Now that state legislatures are weighing in with new standards and procedures related to regulatory takings, the specter of *res judicata* and collateral estoppel looms larger. Unless the Supreme Court grants certiorari, federal review will likely be foreclosed. The practical result of this procedural tangle will be to place the primary responsibility for compensation decisions on the states.

III. DECIDING WHO SHOULD DEFINE COMPENSABLE ACTIONS

The federal courts have created a system which will avoid, to the greatest extent possible, making compensation questions federal questions. The state legislatures have shown their willingness to tackle the issue, but their efforts raise a fundamental question: will their activities produce better results? Until now, the courts have assumed the sole responsibility for defining compensable government actions in the context of the Just Compensation Clause. The surge in legislative activity forces consideration of the proper choice of institutional decisionmaker.

In choosing the proper arrangement, it is important, first, to bear the ultimate goal in mind. In this instance, the goal is to define more clearly, in light of the core notion of fairness in distributing public burdens, the circumstances under which the government will pay property owners based on the effect of some government action on their property. A clearer description of the boundaries will permit both the government and the property owners to plan and regulate their behavior appropriately. For these purposes, the question of government payment to landowners is not strictly a constitutional one, though it has constitutional parameters. The government could choose to pay property owners more often than the constitution required—the Fifth Amendment merely sets a floor. The problem the states seek to resolve is first and foremost a financial one and only secondarily a constitutional one.

Much current discussion of institutional decisionmakers is rooted in interest group political theory, principally applied by its economic

97. The Restatement (Second) of Judgments actually chooses the term "issue preclusion" over collateral estoppel, apparently to avoid confusion over the two traditional types of estoppel. Restatement (Second) of the Law of Judgments § 17 cmt. c, § 27 (1982).

98. *Id.* § 27; see also *id.* § 28 (listing exceptions to the general rule), § 29 (discussing issue preclusion in suits against other parties).

cousin, public choice theory.⁹⁹ The answers from public choice theory, however, are ultimately unsatisfying because the analysis cannot frame the question properly. The analysis begins with a stark question: What are the strengths and weaknesses of the decisionmaking institution that suit it well or poorly to make this compensation decision? As this part discusses in detail, the public choice analysis typically ends with this question as well. Although public choice is useful, it only moves part way to a solution. It outlines the choices, but offers scant guidance about how to make the choice.

A. *Introduction to Public Choice Theory: Lawmaking and Economics*

Public choice theory has been defined generally as the application of economic principles to political institutions.¹⁰⁰ Public choice theorists postulate that lawmakers¹⁰¹ are rational decisionmakers who are motivated by the desire to maximize their personal benefit or "utility."¹⁰² In economic shorthand, they are "rational maximizers." Lawmakers seek to maximize their reelection chances, since their office is the font from which all other benefits flow. Reelection requires money and approval, and lawmakers will try to arrange their activities to get the most of both.¹⁰³

Not surprisingly, theories based on this rational maximization premise lead to less than exemplary group behaviors.¹⁰⁴ The economic per-

99. Economists James Buchanan and Gordon Tullock produced the seminal work in the public choice field in 1962, which claimed to straddle the border between politics and economics. James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor Paperback 1965) (1962). The authors explained their purpose was "to analyze the calculus of the rational individual when he is faced with questions of constitutional choice." *Id.* at vi.

100. Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 1 (1991).

101. Public choice focuses on legislators because it is primarily concerned with public law. *See id.*

102. "Utility" is a marvelously elastic economic term which is used to describe the level of satisfaction a person derives from an activity or a good. *See* Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* 88-89 (4th ed. 1997). Economists numerically rank individual preference among activities in order to graph utility distributions. These utility curves enable economists to make predictions about people's behavior and their demand for goods and services. *See generally id.* ch. 3.

103. Farber & Frickey, *supra* note 100, at 22 n.45.

104. Nobel laureate Kenneth Arrow, a pioneering economist in using game theory as a description of group decisions, laid the foundation for the most dismal portrait: the chaos of majority voting. Essentially, Arrow's Theorem demonstrates that, if the majority rules, the majority's choice will cycle endlessly depending on the order in which choices are presented for a vote. For example, assume a world comprised of three voters, Kimberly, Will and Pete, and three choices, labeled *Q*, *R*, and *S*. Kimberly's preferences are (in order) *Q*, *R*, *S*; Will's preferences are *R*, *S*, *Q*; and Pete's preferences are *S*, *Q*, *R*. If the first vote pits *Q* against *R*, *Q* will win (Kimberly and Pete); however, *Q* will then lose in the next vote against *S* (Will and Pete). If the voting order changes, the result will change. If, instead, the first vote is *R* against *S*, *R*

spective on the legislative process rests on the assumption that legislators and those who seek legislative help are all trying to maximize benefits. Thus, they will not support a given legislative action unless the benefit to them exceeds their cost.¹⁰⁵ This search by individuals and interest groups for special benefits is known as "rent-seeking."¹⁰⁶

Cost-benefit analysis provides insight into the most profound flaw in the lawmaking process, known as "minority capture" or "minoritarian bias."¹⁰⁷ Minoritarian bias describes situations in which cohesive minorities are able to influence lawmakers to pass legislation they favor. Although everyone has preferences and seeks to maximize utility, not everyone will seek to influence legislative choice every time. The decision to exercise political influence is predicated on the same analysis as all other individual decisions: whether the benefit will exceed the cost. Legislative influence is costly; it takes time and effort, in addition to cash. At a minimum, there are the costs associated with gathering and disseminating information, as well as organizing individuals into groups. There may be costs for lobbying lawmakers directly, including campaign contributions. As the size of the group increases, the costs increase as well.¹⁰⁸

Legislative rent-seeking also unavoidably suffers from a "free-rider" problem. With any public measure, it is impossible to limit the benefit to the people who actually organized and contributed or lobbied for it. For example, if a sales tax rebate for prescription drugs

will win (Kimberly and Will), but *Q* will be the ultimate winner (Will and Pete). In each case, the winner will be different and a majority will prefer one of the losers.

The cycle can be avoided by strategic voting; for example, Kimberly would not vote her true preference in the first round in order to make sure her preference triumphed in the next round. In addition, obviously, the cycle can be broken, and the outcome controlled, by the agenda-setter (the person who can dictate the order of voting). The problems of strategic voting and agenda-setting make it doubtful that any majority vote is an accurate reflection of popular consensus. See Farber & Frickey, *supra* note 100, at 38-42; William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 Va. L. Rev. 373, 381-88 (1988); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. Rev. 1, 7-9 (1991). An equally problematic variant of strategic voting is "logrolling," an American political idiom for vote trading among legislators to gain support for pet projects. For example, Pete would agree to vote for a dam project in Will's legislative district if Will promised to vote for a bridge project in Pete's legislative district. See Buchanan & Tullock, *supra* note 99, at 155-58; Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 Va. L. Rev. 625, 635-42 (1994).

105. See Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 Va. L. Rev. 179, 181 (1988) (arguing that narrow self-interest is a significant motive of political agents, though not the sole motive).

106. See, e.g., Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 55 n.3 (1994) (summarizing the work of economist George Stigler on rent-seeking).

107. *Id.* at 54-56.

108. See Buchanan & Tullock, *supra* note 99, at 112.

was championed by a senior citizens organization and passed, the rebate would not be limited to the organization members. Everyone who bought a prescription drug would benefit, whether or not they worked for the legislative change. As group size grows, the temptation to "let someone else do it" also grows.¹⁰⁹

Using cost-benefit analysis, minoritarian bias is easier to understand. Any legislation with costs limited to a small group and widely dispersed benefits or, similarly, with highly concentrated benefits and widely dispersed costs, will spur the concentrated group to take action.¹¹⁰ Since their payoff is big and their organizing cost relatively small, the concentrated interest group will coalesce. Their dispersed opponents, however, will not; the higher organizing costs and increased free-rider problems mean no one will find it worthwhile to mount an organized opposition.¹¹¹ Thus, an organized, cohesive minority can "capture" the legislature, to the detriment of the general welfare.¹¹²

Public choice also offers a new slant on an old evil: the tyranny of the majority.¹¹³ Domination and exploitation of the minority by the entrenched majority form the dark cloud that lurks always on democracy's horizon. In light of the insights of public choice into the legislature's susceptibility to minoritarian capture, it seems incongruous to speak of majoritarian exploitation. How could the same entity be controlled by the minority and the majority?

Public choice explains away the anomaly by focusing once again on cost and benefit.¹¹⁴ The majority, by definition, has a numerical advantage, but that numerical advantage is worthless unless the majority members get information about the issue, organize and enter the political fray. The lower the per capita benefit, whether relative to the cost or in absolute terms, the less likely the majority will become active, which leaves the field wide open for minority interest groups whose members have a higher per capita stake in the outcome.¹¹⁵ The

109. See Farber & Frickey, *supra* note 100, at 23; Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 134 (1971).

110. See Komesar, *supra* note 106, at 68.

111. See *id.* at 69-70.

112. See Farber & Frickey, *supra* note 100, at 33-34. But see Peter H. Schuck, *Against (and For) Madison: An Essay in Praise of Factions*, 15 Yale L. & Pol'y Rev. 553 (1997) (noting the benefits to society of special interest groups).

113. Komesar attributes the phrase to de Tocqueville, but prefers the less pejorative "majoritarian bias." Komesar, *supra* note 106, at 76.

114. See generally *id.* at 65-82 (discussing factors that determine the relative strengths and weaknesses of minoritarian and majoritarian interest groups).

115. Komesar does point out one counterweight to the disorganized majority, which he calls "catalytic subgroups." These are small groups (or even individuals) within the majority who have sufficiently high stakes that they can galvanize the majority, or at least credibly threaten it. Their success at mobilizing is, again, a function of the cost of organizing and disseminating information. Komesar posits that the cost is inversely related to the amount of information the majority already has, the com-

recognition that costs and benefits are distributed differently for different issues and at different times¹¹⁶ makes it understandable that sometimes numerical minority groups will prevail.¹¹⁷

B. *An Illustration of Minoritarian Bias (With a Majoritarian Response): Washington's Property Rights Initiative*

The state of Washington's foray into property rights legislation offers an example of the virtues and vices of the legislative process. In Washington, conservative property rights activists, a well-organized minority funded by the state farm bureau, home builder and realtor groups, and several timber companies,¹¹⁸ drafted an initiative measure¹¹⁹ mandating compensation any time property was taken for public use or its use limited for any reason except the prevention of a public nuisance.¹²⁰ They gathered sufficient signatures to present the initiative to the legislature, which approved it.¹²¹ Opponents of the measure successfully gathered signatures in favor of a referendum¹²² on the bill.¹²³ Their primary weapon was the astronomical cost to taxpayers of compensation for every government action, which the University of Washington's Institute for Public Policy projected to be in

plexity of the issue, and the per capita stake of the remaining majority. *See id.* at 82-84.

116. Fischel makes a similar point with levels of government: small local governments tend toward majoritarian bias, while state and federal governments tend toward minoritarian bias. Fischel, *supra* note 73, at 328. He would advocate greater judicial scrutiny in majoritarian bias situations, where some victims of regulatory takings are completely shut out. *Id.* at 367.

117. Majoritarian bias may act as a countervailing force against minoritarian bias. *See Komesar, supra* note 106, at 65-75.

118. David Postman, *Wash. State Rejects Land Rights Law: Defeat May Slow Down National Legislation*, *Wash. Post*, Nov. 11, 1995, at E1.

119. The Washington constitution permits citizens to present an initiative to the state legislature for approval if the initiative petition is signed by voters equal to at least eight percent of the number of people who voted in the most recent gubernatorial election. The legislature must accept or reject it without amendment. *Wash. Const. art. II, § 1(a)*.

120. Private Property Regulatory Fairness Act, I.M. No. 164, ch. 98, 1995 *Wash. Legis. Serv.* 98 (West).

121. Kathy George, *Big Guys Bow Out of Ballot Measure: Property Rights Leaders Undaunted*, *Seattle Post-Intelligencer*, Aug. 2, 1995, available at 1995 WL 4319416.

122. Any bill passed by the legislature, including an initiative, can be subject to popular referendum by petition of voters equal to at least four percent of the number of people who voted in the most recent gubernatorial election. *Wash. Const. art. II, § 1(b)*.

123. George, *supra* note 121, at B1.

the billions.¹²⁴ Based largely on fears of high cost, it was defeated at the polls by a wide margin.¹²⁵

The Washington experience is a good public choice illustration of the forces at work in the political process. Initially, the minority was able to "capture" the legislature and win approval of a measure which afforded its interests large tangible benefits (but widely dispersed the costs). Once the law was passed and more information about it became public, catalytic subgroups in the majority were able to mobilize opposition by focusing on a simple message—catastrophic cost—and convincing voters that their stakes in the outcome were high.¹²⁶ Moreover, although the Washington experience can be read as a cautionary tale of the difficulty of crafting a workable, palatable regulatory takings statute, it also illustrates the relative flexibility of the legislative process in that the majority was able to force a change in course comparatively quickly.

C. *Single Institutional and Comparative Institutional Analysis*

Interestingly, commentators critical of the legislature because of minoritarian bias, as well as those who fear the tyrannical majority, typically advocate the same solution: the judiciary. Their advocacy of judicial review includes judicial protection of property rights.¹²⁷ John Hart Ely, for example, advocated the judiciary as the protector of discrete, politically powerless minorities.¹²⁸ In Ely's view, a primary judicial function is to scrutinize the content of and legislative process for a bill to determine whether all sides participated or some groups were shut out.¹²⁹ He interpreted the Just Compensation Clause as "yet another protection of the few against the many."¹³⁰

Richard Epstein advocated stricter judicial scrutiny of legislation from a different perspective. Based on his views that much economic legislation involves forced redistribution of wealth from those who

124. Rob Eure, *Washington Voters Reject Effort to Restrict Government Takings*, The Oregonian, Nov. 8, 1995, at A11 (reporting that \$300,000 to \$1 billion would be required to meet economic impact study requirements in 1994, and \$3.8 billion to \$11 billion for compensation).

125. Postman, *supra* note 118, at E1 (reporting that the "citizen-written measure was defeated by a 3-2 margin"). It is interesting to note that the other two states which have put property rights bills on a referendum, Arizona and Rhode Island, have also defeated them. See Eure, *supra* note 124, at A11.

126. Postman, *supra* note 118, at E1 (noting environmental and other groups organizing opposition to measure). Catalytic subgroups are discussed *supra* note 115.

127. See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 48-72 (1985) (arguing that courts should enforce more stringently rationality requirements of, *inter alia*, the Just Compensation Clause); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 Tul. L. Rev. 849, 875 (1980) (advocating judicial scrutiny and invalidation of private-interest legislation).

128. John Hart Ely, *Democracy and Distrust* (1980).

129. See *id.* (especially ch. 4 (discussing the process of representation), ch. 6 (discussing the representation of minorities)).

130. *Id.* at 97.

have property to those who do not, he suggested that a judge should routinely review legislation, particularly those regulating or redistributing property (broadly defined), to invalidate rent-seeking legislation.¹³¹ Others have made a similar argument, that the judiciary should raise its level of scrutiny for economic rights to one equal to the level of scrutiny for civil rights.¹³² In their view, the rent-seeking abuses of legislatures can only be cured with increased judicial review.¹³³

The difficulty with this approach is the implicit assumption that the judiciary's virtues are sufficient to overcome not only the flaws of the legislature, but its own flaws as well. Because the legislative option is unacceptable, the judiciary *must* step in. The critics of expansive judicial review, however, use the same process to conclude that the flaws of the judiciary undermine its putative superiority. Judges are no better placed—and may be worse so—to identify, understand, and balance increasingly complex property rights and harms in a growing society.¹³⁴ Neil Komesar notes that wrongs would go without redress because the courts must wait for cases to come to them and people who are harmed will not always sue.¹³⁵ The courts lack the capacity to handle the massive volume of cases that would arise if they reviewed every legislative or executive act for compliance with the Just Compensation Clause.¹³⁶

Einer Elhauge offered a detailed critique of the arguments favoring increased judicial review.¹³⁷ He pointed out that the description of interest group influence as “disproportionate” was inextricably bound up in a normative judgment about a political outcome.¹³⁸ He also noted that there was no basis in public choice theory to exclude judges from the population of rational maximizers, and no guarantee that they would behave any better than their legislative colleagues.¹³⁹ He found the cost-benefit arguments for increased judicial review lacking as well. Even if judicial review made minoritarian capture more costly by adding a judicial hurdle to the legislative one, he argued, the increased cost would not necessarily discourage a special interest group. Given that a judicially vindicated law would be more likely to stay in

131. See Epstein, *supra* note 7, at 281; see also *id.* at 322 (discussing welfare regimes as rent-seeking).

132. See Riker & Weingast, *supra* note 104, at 399.

133. See *id.* at 399-400.

134. See Gillette, *supra* note 104, at 634-35, 686 (finding no basis to believe that the judiciary is sufficiently superior at ferreting out expropriative legislation to justify cost of review).

135. This is because cost to the potential plaintiff exceeds benefit, or the potential plaintiff has insufficient information, for example. Komesar, *supra* note 106, at 137.

136. *Id.* at 238.

137. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L.J. 31 (1991).

138. *Id.* at 49-59.

139. *Id.* at 80-83.

place, it would become even more valuable and could be worth more than the extra cost to the interest group.¹⁴⁰

Ultimately, the flaw in the analysis has nothing to do with inaccuracies in the description of the institutional defects; rather, it comes from assuming that if the legislature is a bad choice, then the judiciary must be a good one. Komesar described this as a flaw of "single institutional analysis," and advocated *comparative* institutional analysis.¹⁴¹ In a sense, comparative institutional analysis simply asks the follow-up question. The first question, the one which public choice answers readily, is "What is wrong with this institution?" This single question cannot end the inquiry, however, because all institutions are flawed. The next question should be "Which institution is the 'best'—the least flawed—for the purpose?"¹⁴² Only a comparison of the structure and operation of given institutions against each other in the context of a given problem, such as regulatory takings, can yield insight into the appropriate institutional arrangement.¹⁴³

Comparative institutional analysis offers tremendously valuable insight into the wise use of institutional analysis, but it is still unsatisfying, at least in the regulatory takings realm, because it is difficult to escape the conclusion that there are no good institutional choices. The difficulty with comparative institutional analysis, as well as single institutional analysis, is that both frame the question of the appropriate decisionmaker as an absolute "either-or" choice. The implicit assumption that one institution must be picked over—i.e., to the exclusion of—another is contrary to the American constitutional structure. Certainly, the single institutional inquiry and the comparative institutional inquiry must be made. The analysis remains incomplete, however, until a third question is answered: "Is there a mode of interaction between the legislative and judicial institutions that will produce a better result?" The third question encompasses comparative institutional analysis, but moves a step further; a more descriptive term, perhaps, would be "complementary institutional analysis."

Complementary institutional analysis is consonant with the American structure, in which the arrogation of power to a single decision maker is rare. The real question is who is going to take the first shot at the problem. There is no question about who gets the last shot, at least in the American constitutional system—the judiciary does. It is

140. *Id.* at 89-92.

141. See Komesar, *supra* note 106, at 3-7.

142. Komesar trenchantly captured the idea: "In the complex world of institutional choice, foxes might be assigned to guard the chicken coop where the alternatives (bears, weasels, and so forth) are worse." *Id.* at 204.

143. As an object lesson in the importance of comparative institutional analysis, see Komesar's critique of Epstein's regulatory takings analysis. *Id.* at 235-50.

solely the province of courts to define the constitution.¹⁴⁴ Until now, the courts have had the only shot; if the legislature took on the property rights problem first, would legislation assist in meeting the goals of fairness and clarity? That is the question from a complementary institutional perspective. The remainder of this part will use findings from positive political theory to describe the proper role of the legislature; to resolve basic regulatory takings questions through specific guidelines, and help narrowly frame the remaining issues for the courts.

D. *Complementary Institutional Analysis: Insights from Positive Political Theory*

Although there is general agreement that positive political theory is distinct from public choice theory, there is noticeable disagreement over the definitional differences.¹⁴⁵ One consistent theme, however, is that positive political theory is concerned with institutional arrangements, both the operational arrangements within an institution and the effect that institutions have on each other.¹⁴⁶ Positive political theory recognizes that the operations of each branch of government have an impact on the others, and that one branch, by tailoring its activities, can modify the behavior of another, for good or ill.

Positive political theory helps focus on the impact of the legislature on other branches of government. Congress, for example, can exercise profound influence over an oversight agency through a number of devices. By drafting a detailed, narrow charge, Congress can limit the agency's ability to deviate from the legislative scheme established by statute.¹⁴⁷ Similarly, the staff qualifications written into the statute can affect the agency's decisions.¹⁴⁸ Civilian appointees from the agency's target industry are likely to take a different approach to

144. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For a more recent statement of this principle, see *City of Boerne v. Flores*, 117 S. Ct. 2157, 2162-68 (1997).

145. In the foreword to a 1993 symposium on positive political theory ("PPT"), Professors Farber and Frickey recounted the difficulties they had in finding definitions of public choice and PPT. In their survey of the symposium authors, they found that the same number of people thought public choice was a subset of PPT as thought the reverse. A slight plurality, moreover, thought public choice and PPT were disjointed. See Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 Geo. L.J. 457, 458-60 (1992) [hereinafter *Foreword*]. Their proposed definition: "PPT consists of non-normative, rational-choice theories of political institutions." *Id.* at 462.

146. Farber and Frickey quoted an unnamed law professor: "By and large, public choice scholarship is more prone to focus on abstract features of political decision-making, such as cycling and rent-seeking under majority rule or the formation of interest groups than on specific institutional arrangements such as the committee system or court-congress-executive interaction." *Foreword, supra* note 145, at 461.

147. See Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 Geo. L.J. 671, 673 (1992).

148. *Id.*

problems than career civil servants. Congress can stymie the President with slow-paced confirmations of presidential appointments.¹⁴⁹ Ultimately, as the controller of the purse, Congress can adversely affect all units of government through budgetary allocations.

Congress can have the same sort of impact on the judiciary as on the executive branch. The judicial confirmation process can affect cases. If Congress permits judicial vacancies to pile up, cases will be delayed, sometimes quite substantially. Delays can be costly enough to drive parties out of court; some litigants will settle, some will just give up. Congress can certainly send signals to the President during the confirmation process about the qualifications and political philosophy of appointees that will be acceptable, although not all judges comport with the pre-confirmation predictions about their decisions. Congress can also expand or contract the jurisdiction of the federal courts, as well as modify the rules of procedure, subject to constitutional boundaries.¹⁵⁰ Congress may be able to circumscribe statutory interpretation by the courts through detailed legislation, which leaves the court less room to exercise its interpretative discretion.¹⁵¹

Just as Congress can affect the other branches, judicial review, as recognized by the Framers, is an important tool for modifying the behavior of Congress and the executive.¹⁵² As Alexander Hamilton explained: "It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order among other things, to keep the latter within the limits assigned to their authority."¹⁵³

As public choice scholars have pointed out, judicial review of statutes can mitigate the effects of bias.¹⁵⁴ The structure of the judiciary

149. The short-lived nomination of William Weld as ambassador to Mexico is only the most recent example. See Helen Dewar, *Sen. Helms's Gavel Leaves Weld Nomination in Limbo; Chairman Thwarts Majority Call for a Hearing*, Wash. Post, Sep. 13, 1997, at A1.

150. See U.S. Const. art. III, § 2, cl. 2.

151. Cf. Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?* 13 Int'l Rev. L. & Econ. 349, 366-68 (1993) (explaining that Congress can frame statutes broadly, leaving the courts with substantial room to interpret).

152. The Framers were the harbingers, if not the founders of positive political theory. The recognition of the interplay and interdependence of institutions was a central theme in the defense of the Constitution. The structure of the legislature itself is aimed at lessening "factions." The Federalist No. 10 (James Madison). The bicameral legislature, with different sized houses and different qualifications for members, forces any group to command two different majorities to win passage of legislation. Alexander Hamilton specifically recognized judicial review as a crucial implicit mechanism to check the excesses of one institution. The Federalist No. 78 (Alexander Hamilton).

153. The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

154. See, e.g., Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986).

reveals instances in which it would be benefited by antecedent legislative action instead of relying on "common law" lawmaking.

Courts are ill-suited to handle issues that require large-scale expenditures or detailed administration.¹⁵⁵ Courts have no direct authority over public funds, nor can they readily create a large supervisory bureaucracy.¹⁵⁶ The judiciary is smaller than either the executive or legislative branches, and the process of creating and filling judgeships makes it difficult to expand rapidly.¹⁵⁷ The relatively small size, coupled with the procedural requirements—such as response times, discovery periods, and motion and briefing deadlines—make the judiciary slower than the legislature to respond to a social problem.¹⁵⁸ The focus of the judicial process on specific litigants with specific harms also makes litigation an awkward vehicle for resolving systemic social problems.¹⁵⁹ The jurisdictional limitations on the courts would also hamper their ability to implement broad social policy. The courts cannot seek out problems; they can only decide the cases, first, that others bring to them, and, second, that meet the requirements of justiciability.¹⁶⁰

Thinking of institutions as complementary, however, permits recognition that the judiciary can be more effective resolving regulatory takings questions through review of a statute on the subject.¹⁶¹ A statute that draws a line immediately creates potential litigants; the statutory base for the claim may make it easier to determine justiciability. The statute can also provide the court with a more sharply focused question—whether a specific process or philosophy of compensation is appropriate—rather than the amorphous inquiry about whether the government has "gone too far."¹⁶² The statute would also, presuma-

155. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275, 307-08 (1988).

156. See Komesar, *supra* note 106, at 144 n.22.

157. See *id.* at 123, 126-27.

158. See *id.* at 126-27.

159. The availability of class actions does make it easier to bring larger policy questions before the courts. See Eskridge, *supra* note 155, at 304. The class action mechanism does not eliminate the other structural constraints, however, and may exacerbate some, such as the slow pace of civil litigation.

160. See Elhauge, *supra* note 137, at 68-69; Komesar, *supra* note 106, at 126-28.

161. A multitude of articles and books about judicial review have focused on appropriate methods of statutory interpretation. See, e.g., Eskridge, *supra* note 155; John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 Geo. L.J. 565 (1992); Fischel, *supra* note 73; Macey, *supra* note 154; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 Geo. L.J. 705 (1992); Sunstein, *supra* note 127; Treanor, *supra* note 5. A few, such as Eskridge, have discussed whether or not there is any benefit to judicial review of statutes, considering the relative competencies of the judiciary and the legislature. The issue presented here is a slightly different one: In light of the issue's constitutional overtones, the judiciary will ultimately review government action for compliance with the Fifth Amendment. Will the judicial defining process work better if the legislature passes a law about property rights first?

162. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

bly, relieve the court of the fiscal and administrative responsibility for the social program.

The adversarial requirements would ensure that both sides of the question got at least one hearing. Unlike the legislature, which can pick and choose the views it hears, and may only hear one voice, the court must have at least one voice on each side. If there is no opponent, there is no case.¹⁶³ In addition to the framing of the issues in the legislation itself, the adversaries offer specific focal points for the court. As the case proceeds through the trial and appellate process, additional opportunities for debate and distillation would occur. As the state courts consider the state statutes, accepting some and rejecting others, the boundaries of the Just Compensation Clause will become clearer.¹⁶⁴ This activity at the state level may bode well for the Supreme Court's Just Compensation Clause jurisprudence. The Supreme Court has traditionally functioned as constitutional arbiter of state courts,¹⁶⁵ and has often developed doctrine after comparing the trials and errors of various state systems.¹⁶⁶ In its review of state court interpretations of compensation decisions, the Supreme Court can find the uniform baseline necessitated by the Constitution.

Public choice and positive political theory highlight the flaws of the legislature and the judiciary, but also reveal salutary ways in which the two can work together. In the realm of property rights, the judiciary has endured decades of difficulty, while the legislature has just entered the fray. Ultimately, property owners are likely to obtain better guidelines from legislatures, backed up by courts, than from either institution alone. This conclusion is admittedly premised on the promulgation of statutes that actually delineate standards for compensable actions and provide courts with a concrete issue to review. Part IV offers guidance to state legislatures about the content of such statutes.

163. See Eskridge, *supra* note 155, at 304.

164. A legislative starting point could actually allow the courts to hear more property rights cases. As discussed previously, the judiciary has used ripeness and preclusion to keep the vast majority of these cases out of court. See *supra* notes 88-98 and accompanying text. Legislation can eliminate the ripeness question by making it clear when a final decision has been reached on permitted use of property and on compensation.

165. See generally Wright et al., *supra* note 89, §§ 4006 (discussing the origin and development of jurisdiction over state courts), 4007 (discussing the limitation of jurisdiction over judgments by a state's highest court).

166. The notion of the states as laboratories originated in the dissent of Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.") The concept has not lost its appeal to the Court with the passage of time. See, e.g., *Arizona v. Evans*, 115 S. Ct. 1185, 1198 n.1 (1995) (Ginsburg, J., dissenting); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., concurring in denial of certiorari).

IV. STATUTORY GUIDELINES

Not all statutes would facilitate clarification of the regulatory takings standard. The current assessment statutes, which do little more than parrot the existing judicial interpretations of the Fifth Amendment and tell the targeted agencies to follow the law, do nothing to simplify the regulatory takings quandary. At best, they remind people to do what they ought to be doing already. At worst, they create an additional layer of bureaucratic review, with concomitant delay,¹⁶⁷ which ultimately will have little impact on regulations.¹⁶⁸ The generality of the statutes also leaves room for manipulation by the agencies. Where the statutes merely incorporate the Supreme Court's Fifth Amendment jurisprudence, they may be evaded or inconsistently applied by different attorneys general or agency heads; they offer no improvement over the status quo. Equally important, since they offer no additional insight into the regulatory takings definition, the assessment statutes provide the court no help in refining the boundaries of regulatory takings.¹⁶⁹

Ideally, to advance the regulatory takings definition through the judiciary, a statute should do at least two things. It should establish a benchmark for offering compensation. A benchmark gives a court a concrete point to accept or reject, and the court's decision gives lawmakers and potential litigants a path to follow. In addition, a statute should be structured to minimize the number of disputes, and to resolve any disputes as early as possible. Quick resolution minimizes cost to everyone involved and helps insure that the cases that do reach the court are the ones that present the starkest choices and the most fundamental disagreements between the government and the landowner. Those are the disputes that present the clearest options to the

167. In addition to the delay involved in the internal review process, those states permitting a private right of action to challenge an assessment or force an assessment to be completed create an opportunity for individuals to delay significantly the implementation of a regulation. Robert Ellickson points out that this tactic has been used often with environmental impact statements. See Robert C. Ellickson, *Takings Legislation: A Comment*, 20 Harv. J.L. & Pub. Pol'y 75, 78-79 (1996).

168. Although impossible to predict with perfect accuracy, it is unlikely that the assessment requirements would weed out a great number of regulations. The statutes require a "facial" assessment, meaning that the regulation, on its face, without regard to any specific land, owner or set of circumstances, would impermissibly deprive affected owners of property rights. As previously noted, facial challenges to regulations are rarely sustained in Fifth Amendment cases. See *supra* note 91; see also *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1666 n.10 (1997). The rule may harm some owners greatly, others negligibly; only when the rule is applied to a particular property owner does the taking become apparent. The "takings impact analysis" cannot assess the individual impact; thus, unless every affected person is harmed, the rule will pass muster. Lynda Butler's analysis of the federal agencies' response to Executive Order 12,630 (mandating takings impact analyses for proposed federal agency rules) supports the notion that agencies would rarely find that one of their proposed regulations failed the test. See Butler, *supra* note 79, at 794.

169. See generally Cordes, *supra* note 76, at 221-25 (critiquing assessment statutes).

court. This part will offer statutory recommendations based upon these two requirements, and discuss the positive and negative characteristics of existing statutes in this context.

A. *Definitions and Scope*

Statutory definitions serve as a vehicle to limit the compensation obligation. The statute should be confined to real property, but include all interests in the possession or use of real property. The limitation to real property is consistent with the existing statutes and seems to reflect the core of the current property rights problem—significant limitations on the use of land, ostensibly to promote intangible public benefits. Equally important, Justice Scalia muddled the definitional waters in *Lucas* by asserting, for the first time, that different regulatory takings standards applied to real and personal property.¹⁷⁰ Without some compelling reason to enter this part of the constitutional debate, confining the statutory definition to real property seems both appropriate and sufficient. By the same token, there is little reason to limit the reach of the statute to certain types of real property. The current statutes limiting remedies to special-purpose land, such as agricultural or forest land, appear to fulfill the rent-seeking prophecies of public choice theory.¹⁷¹ There is no obvious benefit to singling out certain types of property for compensation remedy; if a certain type of land is often the subject of overreaching regulation, the owners would still be compensated, perhaps frequently, even under a statute covering all types of real property interests. If the benefit is that the narrow statute is less costly because compensation is limited to a small group, it is a classic example of rent-seeking.

These definitions should rely on well-settled law whenever possible, to simplify interpretation and give clearer guidance to property owners and regulators. Fortunately, there is some well-settled property compensation law, developed under the state eminent domain statutes. Real property interests can readily be ascertained with reference to existing state eminent domain law; interests which would be compensated in a straightforward condemnation action should be compensated.¹⁷² Similarly, eminent domain law can also help define the owner, the receiver of compensation.¹⁷³

A surprising number of current state statutes fail to define "property" at all, thus providing no guidance concerning the types of interests protected by the laws. The statutes without definitions are assessment statutes, which generally delegate much definitional dis-

170. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

171. See *supra* note 77 (Mississippi); Louisiana in State Appendix, § B.

172. See Model Eminent Domain Code (U.L.A.) § 103(19) (defining "real property"), official cmt. (West 1986).

173. See *id.* § 103(6) (defining "condemnee" & § 204 official cmt. (discussing definition of "owner") (West 1986).

cretion to the Attorney General in any event.¹⁷⁴ Allowing the Attorney General to define a few more items may seem insignificant, but discretion in defining the coverage of the statute creates opportunities to limit its reach in ways that the legislature may have never intended. It is one thing to let the Attorney General draft guidelines explaining current judicial interpretations of the Fifth Amendment, but quite another to let him figure out who and what are affected by the statute.

The statutes should also exclude activities for which the remedy is already well understood, rather than risk adding to the uncertainty. Statutes need not include acts covered by the state eminent domain law, nor should they include physical invasions or appropriations of land. Physical invasions have long been recognized as compensable under the Fifth Amendment.¹⁷⁵ Including such cases under the statute would actually create confusion instead of ameliorating it, by engrafting a second-tier statutory claim onto a straightforward constitutional claim. The statute can promote clarity by focusing specifically on the area of confusion—regulatory takings.

Although narrow specificity is important in defining the eligible property, the current statutes tend to be overly narrow in their coverage of government entities. The limitation of so many statutes' reach to state agencies seems particularly odd in light of the fact that so much of the activity affecting land use is local, administered by municipalities and counties. Although statutorily authorized by the states, the ordinances and regulations governing zoning, subdivision and building requirements are all promulgated on the local level. Confining the statutory remedy to state-level activities means a great deal of inappropriate activity could remain unaddressed. Whole categories of difficult questions would be left in the regulatory takings muddle. Similarly, some current statutes confine their reach to specific state agencies.¹⁷⁶ If the goal is to compensate owners who lose the use of their property, it is difficult to understand why the availability of compensation would turn on the identity of the entity responsible for the deprivation. If compensation for property rights is not the goal, but rather regulation of certain bureaucratic behavior, there are certainly more direct and cheaper means to accomplish that end.

B. *Compensable Events*

The focal point of the interplay between the legislature and the court is the establishment of statutorily compensable events. The legislative creation of criteria for payment to landowners will provide courts a compensation baseline to evaluate. The criteria need not be

174. See Delaware, Indiana, Maine, Michigan, Missouri, Virginia, Washington, and West Virginia in State Appendix, § A.

175. See *Lucas*, 505 U.S. at 1015.

176. See Michigan and West Virginia in State Appendix, § A; Mich. Comp. Laws Ann. § 24.422(b) (West Supp. 1997); W. Va. Code § 22-1A-6 (1994).

identical in each state. Differences in population, topography, size, industrial concentrations, agricultural uses, and a host of other cultural, historical, and economic factors may lead to variations in the compensation scheme. The Fifth Amendment, however, does establish a minimum requirement for compensation. The core notion of the Fifth Amendment—that the community's burdens should be distributed equitably among its citizens without singling out individuals for a disproportionate share of the cost of community welfare—prescribes the norm for evaluating the compensation scheme.¹⁷⁷

Three state remedial statutes require compensation whenever the value of property is decreased by a certain percentage as a result of regulatory activity.¹⁷⁸ The percentage trigger appears to move a long way toward the goal of greater clarity, but its clarity comes with a high cost.¹⁷⁹ The lower the trigger point, the more payments the government will have to make. A high trigger, however, diminishes the usefulness of the statute since fewer people will be able to use the remedy; moreover, a high trigger undermines fairness, since someone who appears deserving will not be compensated. Even the clarity of the compensation trigger is largely superficial.¹⁸⁰ Stating a percentage is not enough; the statute must be clear about the extent of the property to be considered in calculating the percentage. Commentators have dubbed this issue "the denominator problem."¹⁸¹ If the trigger is based only on the land affected by the challenged regulation, the chances that the percentage threshold will be met increase dramatically. If the trigger is based on all the property owned by the complainant, the likelihood that the threshold will be met diminishes. In addition, because valuations are based on appraisals, the percentage trigger offers only the illusion of precision. Appraisals contain a number of essentially subjective components and may use several different approaches to determine value.¹⁸² The court will be forced to choose among battling appraisers to determine, first, if compensation is triggered and, if so, how much is appropriate.

Florida takes a different approach, one more explicitly consonant with the need for fairness. The Florida statute allows compensation

177. See *supra* notes 69-73 and accompanying text.

178. See *supra* note 77 (Mississippi); see also Louisiana and Texas in State Appendix, § B.

179. See generally Cordes, *supra* note 76, at 225-29 (critiquing compensation statutes).

180. See Ellickson, *supra* note 167, at 81 (questioning whether claimants would be able to aggregate the effects of variety of regulations to meet the percentage).

181. See, e.g., Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663 (1996) (proposing a solution for the denominator problem); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 Wash. & Lee L. Rev. 265, 289-90 (1996) (describing the difficulty of arriving at a denominator of property to which loss may be compared).

182. See generally Paul Goldstein & Gerald Korngold, *Real Estate Transactions*, 386-404 (rev. 3d ed. 1997).

for owners who are "inordinately burdened" by a government act.¹⁸³ The law essentially codifies the fairness notion that singling out individuals to shoulder social costs is impermissible. This formulation avoids the problems with a trigger point; it also permits consideration of benefits conferred on the owner, unlike the trigger statute. The countervailing benefits bear on whether the burden is inordinate; however, the statute offers no specific definition of inordinate burden. It refers to Supreme Court descriptive phrases, but provides only a new catch-phrase instead of a clarification of the compensation standard. Because the statute is brand new, it is open to interpretation by agencies, judges and litigants. It offers little certainty to the government in planning or promulgating rules, nor does it give citizens a chance to arrange their behavior to meet (or avoid) the new rules.

By developing new vocabulary, Florida sacrificed certainty to embrace more closely the fairness notion. Although it avoided the calculation problems and the potential for arbitrariness of the percentage trigger statutes, the Florida statute trades one set of definitional difficulties for another. A better approach, which retains the flexibility and fairness, but minimizes the interpretational difficulties, is to look once again to well-settled law. In this instance, zoning law can provide a useful definitional framework for the concept of "hardship." The Standard State Zoning Enabling Act ("SSZEA"), promulgated by the Commerce Department in 1926, used "unnecessary hardship" as the basis on which variances from the strict enforcement of the zoning ordinance could be granted.¹⁸⁴ To militate against the Fifth Amendment attack, the SSZEA gave the zoning board the power to grant "a variance from the terms of the ordinance" when the landowner could demonstrate that strict enforcement of the zoning ordinance would cause him unnecessary hardship.¹⁸⁵ Comprehensive zoning schemes would diminish property values in some instances, but raise them in others. The SSZEA created the variance mechanism to protect the owner singled out to bear a disproportionate burden, thereby embracing the core notion of fairness. Almost all states adopted the SSZEA,¹⁸⁶ and the notion of relief based on hardship is nearly universal.¹⁸⁷

183. See Florida in State Appendix, § B; Fla. Stat. Ann. § 70.001 (West Supp. 1997).

184. SSZEA § 7(3), reprinted in Daniel R. Mandelker, et al., *Planning and Control of Land Development* 199 (4th ed. 1995).

185. *Id.*

186. See Daniel R. Mandelker, *Land Use Law* § 4.16 (3d ed. 1993).

187. See *id.* § 6.41. All but a handful of states have statutorily incorporated the hardship criterion. State code sections noting hardship standard: Ala. Code § 11-52-80 (1994 & Supp. 1996); Alaska Stat. § 29.40.050 (Michie 1996); Ariz. Rev. Stat. § 11-807 (1990); Ark. Code Ann. § 14-17-209 (Michie 1987 & Supp. 1995); Cal. Gov't Code § 65906 (West 1983 & Supp. 1997); Colo. Rev. Stat. § 31-23-307 (1997); Conn. Gen. Stat. Ann. § 8-6 (West 1989 & Supp. 1997); Del. Code Ann. tit. 9 § 1352 (1989 & Supp. 1996); D.C. Code Ann. § 5-424 (1994 & Supp. 1997); Fla. Stat. Ann. § 70.51 (West Supp. 1997); Idaho Code § 67-6516 (1995); 55 Ill. Comp. Stat. Ann. § 5/5-12009

Adopting the hardship standard to the compensation statute retains the core notion of fairness and allows a degree of flexibility in making the compensation decision. It permits consideration of special characteristics of the land and the owner, but also embraces the notion of countervailing factors which would militate against a hardship, such as whether the owner knew of the impact of the regulation on her land before she purchased it.¹⁸⁸ The hardship standard also takes into account another element of fairness, benefits which inure to the land as a result of the regulation. The presumption is that the regulation benefits everyone in the community; therefore, it is up to the owner to demonstrate that she has been singled out, and that the burden outweighs the benefit for her. In addition, the hardship standard has been part of American law for over seventy years; it has been considered and refined in countless cases.¹⁸⁹ Although not a mathematically exact standard, it is a familiar one, and one whose parameters have been fleshed out by generations of judges. Certainly, it will have to be adapted to some degree to fit a compensation scheme, but it is easier to adopt an analogous standard than to create one from whole cloth.

C. *Compensation Procedures*

A Just Compensation Clause claim will likely be available for conduct that would be covered by the statute, but the mingling of statutory and constitutional claims would unnecessarily complicate the

(West 1993 & Supp. 1997); Ind. Code Ann. § 36-7-4-918.4 (Michie 1995 & Supp. 1997); Iowa Code Ann. § 335.15 (West 1994); Kan. Stat. Ann. § 12-759 (1991 & Supp. 1996); Ky. Rev. Stat. Ann. § 100.243 (Michie 1993 & Supp. 1996); La. Rev. Stat. Ann. § 33:4727 (West 1988 & Supp. 1997); Me. Rev. Stat. Ann. tit. 30-A, § 4353 (West 1996); Mass. Ann. Laws, ch. 40A, § 10 (Law. Co-op. 1993 & Supp. 1997); Mich. Comp. Laws Ann. § 125.585 (West 1997); Minn. Stat. Ann. § 394.27 (West 1997); Mo. Ann. Stat. § 65.690 (West Supp. 1997); Mont. Code Ann. § 76-2-223 (1997); Neb. Rev. Stat. § 19-910 (1991); Nev. Rev. Stat. Ann. § 278.300 (Michie 1995); N.H. Rev. Stat. Ann. § 674:33 (1996 & Supp. 1996); N.J. Stat. Ann. § 40-55D-70 (West 1991 & Supp. 1997); N.M. Stat. Ann. § 3-21-8 (Michie 1995 & Supp. 1997); N.Y. Town Law § 62-16-267 (McKinney 1987 & Supp. 1997); N.C. Gen. Stat. § 153A-345 (1991); N.D. Cent. Code § 11-33-11 (county) & § 40-47-09 (city) (1995); Ohio Rev. Code Ann. § 519.14 (township) & § 303.14 (county) (Anderson 1992 & Supp. 1996); Okla. Stat. Ann. tit. 19, § 863.21 (county) (West 1988) & tit. 11, § 44-104 (cities) (West 1994); 53 Pa. Cons. Stat. Ann. § 10910.2 (West Supp. 1995); R.I. Gen. Laws § 45-24-41 (Supp. 1996); S.C. Code Ann. § 5-23-100 (Law. Co-op. 1977 & Supp. 1996); S.D. Codified Laws § 11-4-17 (Michie 1995); Tenn. Code Ann. § 13-7-109 (county) & § 13-7-207 (municipalities) (1992 & Supp. 1996); Tex. Loc. Gov't Code Ann. § 211.009 (West 1988 & Supp. 1997); Utah Code Ann. § 17-27-707 (county) & 10-9-707 (municipalities) (1996); Vt. Stat. Ann. tit. 24 § 4468 (1992 & Supp. 1997); Va. Code Ann. § 15.1-495 (Michie 1990); Wash. Rev. Code Ann. § 35A.63.110 (West 1990); W.Va. Code § 8-24-55 (1990 & Supp. 1996); Wis. Stat. Ann. § 59.694 (West Supp. 1997); Wyo. Stat. Ann. § 18-5-106 (Michie 1996).

188. See Mandelker, *supra* note 186, at § 6.50.

189. Some may argue the hardship standard is not useful because zoning boards routinely ignore it; however, even if that is true for the boards, it is not true for the courts.

issues and muddle judicial review. The simplest way for state statutes to avoid entanglement with the constitutional cause of action is to state explicitly that the statutory claim is in addition to, and not in lieu of, any constitutional claim. Both the Florida and Texas remedial statutes note that the constitutional remedy is distinct.¹⁹⁰ Because of the Fifth Amendment ripeness requirements, however, it will be impossible to keep the claims entirely independent. In order to ripen the Fifth Amendment claim, a landowner must obtain a final determination from the state or local government concerning the permissible use of his property and the payment of compensation. Once the statutory process is established, as a practical matter, claimants will be required to complete it before their Fifth Amendment claim can be considered.

To be effective, the statutory claims process must be as simple, expeditious and fair as possible. The claims could be decided administratively or in the courts. Several current administrative claims processes call upon the offending agency to hear the complaint and make a decision concerning use and compensation. Although it may be fast, it does not appear entirely fair; the accused agency has too much of a political and financial stake in the case. Sending owners straight to court, as Texas does, adds objectivity, but also delay.

A better solution would be to use hearing officers who are not affiliated with any agency involved in land regulation.¹⁹¹ The system would keep these additional claims, which may be numerous, from clogging an already slow judicial branch. Independent hearing officers would also lessen the actual or perceived bias in the compensation determination. The hearing would permit the agency and the landowner to present arguments and evidence, and the hearing officer would be empowered to decide both whether compensation was required by the statute and, if so, the amount of compensation. This single decision would make it much simpler to satisfy the finality requirements for Fifth Amendment ripeness if the owner wanted to press a Fifth Amendment claim. In addition, once again, this structure could be built upon existing state laws for administrative hearings. It might require additional personnel, but it would not require legislators to invent an entirely new process.

D. *Sources of Compensation*

The only point on which assessment statutes have a discernible edge over remedial statutes is the cost of compliance. Assessment statutes are not without costs, but those costs are hidden in the form of extra time expended or extra personnel required to complete the assess-

190. See Florida and Texas in State Appendix, § B.

191. Cf. Stein, *supra* note 91, at 62-63 (suggesting the creation of state land use courts to minimize delay and improve expertise).

ments. The cost of a compensation scheme, by contrast, is quite tangible and quite large.¹⁹² To be credible to the public in general and property owners in particular, a statute must be clear about its cost of implementation and, equally important, about how that cost will be paid. Unless the statute provides a funding method, the statutory scheme will lose legitimacy, and the statute will not be able to provide landowners with any greater certainty about the protection of their property rights.

Cash is certainly the simplest form of compensation, but it is also the most difficult to raise. The statute must establish a funding mechanism and insure that payments are made in a timely manner.¹⁹³ Increases in *ad valorem* taxes are an obvious, if unpopular, fundraising method. Given the difficulty of mustering popular support for a general tax increase, however, the state may rely on more subtle ways of raising funds. One arguably fair method would be to charge or increase fees on activities that are incidental to land ownership—more generally, to assess the cost of compensation against the class of potential beneficiaries. Fees for recording documents in the land records, fees for filing subdivision plats, building permit fees, and building inspection fees are all examples of fees related to land ownership and development. The problem ultimately lies with the compensation trigger and the regulatory activity; there may not be enough money to pay for the regulations that the state and local governments want.

The states can also explore the possibility of using noncash compensation. Some jurisdictions have experimented with "transferable development rights" ("TDRs") to avoid the onerous consequences of regulation, particularly with historic preservation or open space restrictions. In essence, TDRs give the landowner the right to shift the development potential (the amount of development that would have been allowed on the land in the absence of a regulatory prohibition) from one tract of land to another. If the affected landowner does not own any other land, she may sell the TDRs to someone who has land and wants to develop it. To date, no state has built TDRs into its remedial statute, but it appears to be a potentially useful alterna-

192. As noted above, Washington's compensation bill was estimated in the billions. See *supra* note 124 and accompanying text.

193. One of the difficulties with S. 781, pending in the United States Senate, is the failure to mandate a final deadline for compensation. The bill calls for compensation to be paid out of an agency's current appropriations, but if the current appropriations are not sufficient, the agency is to ask for an additional appropriation or fund it from the next year's appropriation. The bill sets no limit on the time of payment, however. See S. 781, 105th Cong., § 204(f) (1997). Since Congress must authorize the appropriation, if Congress does not pass the appropriation, the agency could be trying for "appropriations available in the next fiscal year" for many years. See *id.*

tive.¹⁹⁴ Another non-cash alternative would be some form of tax credit. It is less obvious than a direct cash payment, but it could prove equally devastating to the state budget if the compensation scheme resulted in a significant drop in state revenues.

The potential defects in all these funding schemes underscore the importance of including a specific funding mechanism in the statute. The inclusion of funding demonstrates to the citizenry that the state is prepared to meet its obligations, and it forces all those who debate the statute to make a specific, concrete decision about exactly how much private property protection is worth to them.¹⁹⁵

CONCLUSION

The current property rights debate highlights the difficulties of achieving fairness and certainty in land use regimes. The perceived inadequacies of regulatory takings jurisprudence has led legislatures to grapple directly with private property issues. Although the products of those legislative struggles currently leave a great deal to be desired, at least the property rights debate is in the right place. Legislatures can make the most effective contribution by drafting statutes with concrete standards to focus litigation and frame issues for judicial review. The courts can then work within clearer lines to define the boundaries of the Fifth Amendment. Because of institutional structure and culture, neither the legislature nor the judiciary is suited to solve the regulatory takings dilemma alone. By working in tandem, however, the two institutions have a much better chance to create a clear, sound, and fair regulatory regime for property.

194. See Douglas T. Kendall & James E. Ryan, "Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan, 81 Va. L. Rev. 1801, 1867-75 (1995).

195. Texas did devise a statute that avoids the thorny question by specifying that the only remedy available to plaintiffs would be invalidation of the offending regulation. The defendant agency would retain the option to compensate the landowner in lieu of invalidating the regulation. See Texas in State Appendix, § B; Tex. Gov't Code Ann. § 2007.006(a) (West Supp. 1996). Note, however, that if the court determined that the regulation was unconstitutional, not just in violation of the statute, then compensation would be constitutionally required by *First English*, 482 U.S. 304 (1987).

APPENDIX
SUMMARY OF STATE STATUTES

A. *Statutes requiring studies or assessment of regulations*¹⁹⁶

ARIZONA:¹⁹⁷ Counties, cities, towns and their respective agencies are mandated to comply with four recent Supreme Court regulatory takings cases,¹⁹⁸ as well as binding state and federal court decisions.¹⁹⁹ By November 1, 1995, all counties, cities, and towns were to submit a report to the legislature describing the actions they had taken to conform to the limits on governmental power described in the court decisions.²⁰⁰ A joint committee of the legislature was to review the reports, study possible procedures "to secure the constitutional rights of real property owners against government intrusion," and issue its own recommendations by December 15, 1995.²⁰¹ The committee met and reviewed the submitted reports but adjourned without making

196. Three states have taken slightly different approaches to the assessment of property rights. The Governor of Arkansas issued an Executive Order creating a "Task Force on Regulatory Takings" which is to review current law, assess state procedures, study legislation from other states, and recommend legislation. The deadline for the Task Force report was July 1, 1996. Exec. Order No. 95-04 (1995). At this time, no report has been issued.

South Dakota passed a concurrent resolution criticizing the federal and state governments for infringing on property rights through environmental and land use regulation. In addition, the resolution urged all levels of government to reexamine their laws and regulations to strike a better balance between environmental protection and property rights, and to compensate landowners who sustain losses because of environmental restrictions. Con. Res. 10 (S.D. 1995).

Utah went beyond self-study and created a "Constitutional Defense Council," composed of members of the executive and legislative branches, along with private citizens appointed by the Governor. Utah Code Ann. § 63C-4-101 (1996). The Council's charge is to study the constitutionality of a variety of federal programs and mandates, including "federal laws or regulations that reduce or negate water rights or the rights of owners of private property." *Id.* § 63C-4-102. The Council then advises the Governor and legislature on these questions, and will evaluate the feasibility of challenging these federal programs in court. The Council's chair is empowered to direct the Attorney General to initiate appropriate litigation. *Id.*

197. In 1992, the Arizona legislature passed a bill imposing stringent requirements on state agencies to assess and avoid takings. Opponents gathered sufficient signatures to force a popular referendum on the measure, which was defeated in the next general election on November 8, 1994. *See* Ariz. Rev. Stat. Ann. § 37-221 (Historical and Statutory Notes) (West Supp. 1997). The 1995 bill described in the text applies only to counties, cities, and towns.

198. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. City of Los Angeles*, 482 U.S. 304 (1987).

199. H.B. 42-2229, 1st Sess. § 1 (Ariz. 1995) (city or town) (codified at Ariz. Rev. Stat. Ann. § 9-500.13 (West 1996)); *id.* § 2 (county) (codified at Ariz. Rev. Stat. Ann. § 11-811 (West Supp. 1997)).

200. *Id.* § 3.

201. *Id.* § 4. The bill included a provision repealing Section 4 as of December 31, 1995. *Id.* § 5.

recommendations.²⁰² Arizona's remedial process is discussed *infra* in part B.²⁰³

DELAWARE: Section 605 was added to Title 29 of the Delaware Code in 1992. The statute requires the Attorney General to review every rule or regulation issued by "any state agency,"²⁰⁴ excepting only those rules which do not purport to restrict uses of property.²⁰⁵ The Attorney General must then give written notice to the agency concerning the rule's "potential . . . to result in a taking of private property."²⁰⁶ The statute does not define "property" or "government action," and the governmental entity to which the statute applies is no further defined than "any state agency."²⁰⁷ "Taking" is defined as an action for which compensation would be required under the Fifth and Fourteenth Amendments of the United States Constitution or similar Delaware state law.²⁰⁸ In a "[j]udicial review of actions taken pursuant to this section," a court may only consider whether the Attorney General's review occurred as required under state law and whether the agency was informed of the result in writing.²⁰⁹ Because Delaware has an assessment statute, the law contains neither any specific remedies available to landowners nor any jurisdictional requirements for obtaining such remedies.

IDAHO: Title 67, Chapter 80, of the Idaho Code requires the Attorney General to develop guidelines and a checklist "that better enables [an agency] to evaluate proposed . . . actions to assure that such actions do not result in an unconstitutional taking of private property."²¹⁰ "Private property" is defined as "all real property protected by the Fifth and Fourteenth Amendments" of the United States Constitution or the Idaho Constitution.²¹¹ A "taking" is an "uncompensated deprivation of private property in violation of the state or federal constitution."²¹² As it was passed in 1994, this statute originally applied only to state agencies,²¹³ but in 1995 the law was broadened to apply to all local governments as well.²¹⁴ The state agency or

202. Joint Legislative Study Comm. on the Constitutional Regulation of Private Real Property, Final Report, 42nd Legis. Sess. 1 (Ariz. 1995) (on file with the *Fordham Law Review*).

203. See *infra* notes 342-50 and accompanying text.

204. Del. Code Ann. tit. 29, § 605(a) (Supp. 1996).

205. *Id.* § 605 (reviser's note).

206. *Id.* § 605(a).

207. *Id.* § 605.

208. *Id.* § 605(c).

209. *Id.* § 605(b).

210. Idaho Code § 67-8003(1) (1995).

211. *Id.* § 67-8002(2).

212. *Id.* § 67-8002(4).

213. 1994 Idaho Sess. Laws 116.

214. 1995 Idaho Sess. Laws 182.

local government review process is protected by the attorney-client privilege.²¹⁵

Additionally in 1995, a separate law charged local land use planning commissions with considering the effects of their plans on private property and conducting the analysis prescribed by Title 67, Chapter 80.²¹⁶ For those whose land has been affected by local planning or zoning decisions, Idaho provides two remedies: one administrative and the other judicial.²¹⁷

INDIANA: Indiana requires every rule proposed by a state agency to be reviewed by the Attorney General.²¹⁸ In addition to determining whether or not the state agency followed statutory authority and proper procedures in promulgating the rule, the Attorney General must "consider whether the adopted rule may constitute the taking of property without just compensation to an owner."²¹⁹ If so, the Attorney General must advise the Governor and the agency head of that determination with that advice being protected by the attorney-client privilege.²²⁰ Neither "taking" nor "property" is defined in this statute. The governmental entity to which the statute applies is an "agency," which includes "any officer, board, commission, department, division, bureau, committee, or other governmental entity exercising any of the executive (including the administrative) powers of state government."²²¹ Any failure to issue an order, or part thereof, or the performance of, or failure to perform any duty may be an "agency action" to which the statute applies.²²² Because it is only for assessment purposes, Indiana's statute does not provide any specific remedies nor any particular jurisdictional requirements to obtain them.

KANSAS: The Attorney General is required to develop guidelines "to assist state agencies in evaluating proposed governmental actions and in determining whether such actions may constitute a taking."²²³

215. Idaho Code § 67-8003(2) (1995).

216. *Id.* § 67-6508(a).

217. The remedies and the steps required to seek them are further explained in the Idaho segment of part B of this Appendix.

218. A separate provision of the same law established an "administrative rules oversight committee" composed of four members each from the House of Representatives and the Senate. Ind. Code Ann. § 2-5-18-4, -5 (Michie 1996). Among its duties, the committee may hear any complaint by any person concerning an agency rule or practice. The committee may recommend repeal, modification, or adoption of a rule based on its review of a complaint and, when appropriate, may submit a bill to the legislature to clarify a law or correct the misapplication of a law administered by an agency. *Id.* § 2-5-18-8. Filing a complaint might be a prerequisite for ripeness, as well as one example of a legitimate precondition to consideration of a facial challenge. If the committee could have the rule abolished or modified, the takings issue might be resolved without need for judicial pronouncement.

219. *Id.* § 4-22-2-32(b).

220. *Id.* § 4-22-2-32(f).

221. *Id.* § 4-22-2-3.

222. *Id.* § 4-21.5-1-4.

223. Kan. Stat. Ann. § 77-704 (Supp. 1996).

Each state agency must adhere to the guidelines²²⁴ and, before initiating any action, must issue a report which: identifies the risk to public health, safety, or welfare created by the current use of the private property; explains how the action will protect against that risk; and generally describes whether the action is a taking of property.²²⁵ "Private property" is limited to real property and interests in real property that are protected by the Fifth or Fourteenth Amendments of the United States Constitution or the Kansas Constitution.²²⁶ A "taking" is a governmental action that takes or restricts the use of private property such that compensation is required pursuant to the federal or state constitutions.²²⁷ Under the statute, a state agency includes any "officer, department, division or unit of the executive branch of the state . . . authorized to propose, adopt or enforce rules and regulations" but not the legislature, the judiciary, or "any political or taxing subdivision of the state of Kansas."²²⁸ "Governmental action" includes any state agency action proposing legislation, rules and regulations, or licensing guidelines or procedures.²²⁹ Specifically excluded from "governmental action" is the exercise of eminent domain, any reduction or removal of limitations from private property, or any state action which is in response to a violation of the law.²³⁰ Although this is primarily an assessment statute, it does provide that an owner who successfully proves a taking in court may be awarded "reasonable attorney fees and expenses."²³¹ The Kansas statute, however, does not include any jurisdictional requirements for remedies or any particular limitations on the use of information gathered for assessment purposes.

LOUISIANA: Louisiana requires governmental entities to perform impact assessments of actions that may affect the value of agricultural land or forest land, which would include forestry activities. Government entities must undertake such analysis before "taking any proposed action that will likely result in a diminution."²³² In both cases, copies of the assessments must be submitted to the Governor, the Commissioner of Agriculture and Forestry, and any affected landowners.²³³ To assist private agricultural property owners and state agencies in their assessments to determine whether an action will likely result in a diminution in value, the Commissioner of Agriculture and

224. *Id.* § 77-705.

225. *Id.* § 77-706.

226. *Id.* § 77-703(c).

227. *Id.* § 77-703(a).

228. *Id.* § 77-703(d).

229. *Id.* § 77-703(b)(1).

230. *Id.* § 77-703(b)(2).

231. *Id.* § 77-709.

232. La. Rev. Stat. Ann. § 3:3609(A) (West Supp. 1997) (agricultural land); *id.* § 3:3622.1(A) (forest land).

233. *Id.* § 3:3609(D) (agricultural land); *id.* § 3:3622.1(D) (forest land).

Forestry must promulgate guidelines.²³⁴ It is not clear, however, whether the guidelines must be available by any particular time. "Private agricultural property" is "bona fide agricultural or horticultural land" that is assessed as such for tax purposes, is owned by one or more private citizens or legal entities, and is located outside of the corporate limits of any municipality.²³⁵ "Forest land" is any land devoted to the growing of trees, or to the commercial production of timber, wood, or forest products that is located outside the corporate limits of any municipality and is assessed as such for tax purposes.²³⁶ "Forest activities" are those that occur on forest land in association with "reforesting, growing, managing, protecting, [or] harvesting."²³⁷ Though the statute does not use the word "taking" to refer to a diminution, agricultural land suffers a "diminution in value" when a "qualified appraisal expert" determines that the land has experienced a twenty percent or greater reduction in fair market value as result of any governmental action.²³⁸ Similarly, a twenty percent or greater reduction in the fair market value of forest land "prohibits or limits" it and the activities thereon.²³⁹ A "governmental action" includes an "annexation of territory," the "issuance of a rule, regulation, policy, or guideline promulgated for or by any governmental entity" or any "order or other legally binding directive" which may be enforced by government.²⁴⁰ A "governmental entity" includes a "board, authority, commission, department, office, or agency of the state government," a "local governmental subdivision with a population of less than 425,000," and a "special purpose district."²⁴¹ In both cases, when either a "diminution in value" occurs or when a governmental action prohibits or limits the use of the land, Louisiana provides the owner with a remedy process²⁴² that does not affect any other remedies or rights that an owner "may have under any other provision of law," such as state or federal constitutional takings law.²⁴³

MAINE: Any state regulation must be reviewed by the Attorney General,²⁴⁴ and "major substantive rules"—defined as those which "[r]equire the exercise of significant agency discretion"²⁴⁵ or will impose major burdens, such as significant increases in the cost of doing

234. *Id.* § 3:3609(E).

235. *Id.* § 3:3602(15).

236. *Id.* § 3:3622(2).

237. *Id.* § 3:3622(1).

238. *Id.* § 3:3602(11).

239. *Id.* § 3:3622(6).

240. *Id.* § 3:3602(12) (agricultural land); *id.* § 3:3622(3) (forest land).

241. *Id.* § 3:3602(13) (agricultural land); *id.* § 3:3622(4) (forest land).

242. *Id.* § 3:3610 (agricultural land); *id.* § 3:3623 (forest land). The remedies available are further discussed in the Louisiana segment of part B of this Appendix.

243. *Id.* § 3:3612(A) (agricultural land); *id.* § 3:3624 (forest land).

244. Me. Rev. Stat. Ann. tit. 5, §8056(1)(A) (West 1989).

245. *Id.* § 8071(2)(B)(1) (West Supp. 1996).

business or decreases in property values²⁴⁶—must be reviewed by the legislature.²⁴⁷ The Attorney General is prohibited from approving any proposed regulation that is “reasonably expected to result in a taking of private property under the Constitution of Maine”—there is no mention of the federal Constitution—unless the act is required by law or sufficient variance procedures are in place to avoid a taking.²⁴⁸ Similarly, the legislative review for rules expected to reduce property values significantly must consider, among other items, whether sufficient variance procedures exist to permit the avoidance of an unconstitutional taking, as well as “whether, as a matter of policy, the expected reduction is necessary or appropriate for the protection of the public health, safety and welfare.”²⁴⁹ Neither “property” nor “taking” is defined in the statute. Maine’s remedial process is discussed *infra* in part B.²⁵⁰

MICHIGAN: Michigan’s “Property Rights Preservation Act” applies only to the state departments of Natural Resources, Environmental Quality, and Transportation.²⁵¹ The Attorney General, in conjunction with these three departments, must develop and update annually “takings assessment guidelines” based on current state and federal law.²⁵² The departments must then use the guidelines to identify and evaluate government actions which might result in a taking.²⁵³ “Property” is not defined, but rather, a “constitutional taking” or a “taking” is defined as “the taking of private property by government action such that compensation” is required by the Fifth or Fourteenth Amendments of the United States Constitution or the Michigan Constitution.²⁵⁴ A “government action” includes a permit or license decision, a rule which may limit the use of private property, or the enforcement of such a rule.²⁵⁵ Because the statute addresses only the need for assessment, it provides no specific remedies, jurisdictional requirements, or limitations for aggrieved landowners. Also, the statute does not place any explicit limits on the use of information gleaned through the assessment process.

MISSOURI: If a proposed rule or regulation “limits or affects the use of real property,” the promulgating agency or department must conduct a takings analysis to determine whether, on its face, the proposed rule constitutes a “taking of real property under relevant state and

246. *Id.* § 8071(2)(B)(2).

247. *Id.* § 8072.

248. H.P. 117-1188, 2nd Sess. § 6 (Me. 1996) (codified at Me. Rev. Stat. Ann. tit. 5, § 8056(6) (West Supp. 1996)).

249. *Id.* § 8 (codified at Me. Rev. Stat. Ann. tit. 5, § 8072(4)(H) (West Supp. 1996)).

250. See *infra* notes 380-92 and accompanying text.

251. Mich. Comp. Laws Ann. § 24.422(b) (West Supp. 1997).

252. *Id.* § 24.423.

253. *Id.* § 24.424.

254. *Id.* § 24.422(a).

255. *Id.* § 24.422(c).

federal law."²⁵⁶ Certification that the analysis was conducted must then be submitted with the rule when it is given to the Secretary of State for publication.²⁵⁷ "Property" is not explicitly defined, but the statute does refer specifically to "real property."²⁵⁸ The "taking of private property" is defined as any activity that would give rise to a right of compensation based on the Fifth and Fourteenth Amendments of the United States Constitution or any applicable Missouri state law provision.²⁵⁹ The governmental entities and actions to which the statute applies are no further defined than as "rules" and "regulations" promulgated by "departments" and "agencies."²⁶⁰ Concerned only with assessment, the statute provides neither specific remedies to landowners nor jurisdictional requirements on takings claims. Additionally, the statute does not limit the use of information gathered in the assessment process. As originally passed, Missouri's statute expired on September 1, 1997.²⁶¹ In June 1997, however, a new law removed the expiration provision completely.²⁶²

MONTANA: In 1995, the "Private Property Assessment Act" charged the Attorney General with developing takings guidelines and a checklist to be updated annually and provided to state agencies.²⁶³ As the basis for the guidelines and updates, the Attorney General was to consider state and federal constitutional law and jurisprudence regarding the taking of private property.²⁶⁴ State agencies are to use the guidelines to evaluate agency actions and to prepare impact assessments for proposed actions which implicate takings law.²⁶⁵ The impact assessment must then be submitted to the Governor before the action can be taken.²⁶⁶ The statute defines "private property" as all real property, including water rights.²⁶⁷ Two separate definitions relating to takings are included in this statute. "Taking or damaging" is defined as a deprivation of private property giving rise to compensation under the federal or state constitution.²⁶⁸ Also, an "action with taking or damaging implications" includes proposed state agency actions "pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or

256. Mo. Ann. Stat. § 536.017 (West Supp. 1997).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. S.B. 20-588, 2nd Sess. (Mo. 1994).

262. H. B. 89-88, 1st Sess. (Mo. 1997).

263. Mont. Code Ann. § 2-10-104(1) (1997).

264. *Id.* § 2-10-104(2).

265. *Id.* § 2-10-105(1)-(2).

266. *Id.* § 2-10-105(3).

267. *Id.* § 2-10-103(2).

268. *Id.* § 2-10-103(4).

Montana [C]onstitution[s].”²⁶⁹ “State agency” is defined as “an officer, board, commission, department, or other entity within the executive branch of the state government.”²⁷⁰ An “action” is “a proposed state agency administrative rule, policy, or permit condition or denial.” It should be noted that the term “action” excludes eminent domain proceedings, law enforcement forfeitures, or any reduction in the regulation of private property.²⁷¹ The statute places no limitations on the information in the assessment, provides no specific remedy to landowners, and places no jurisdictional requirements on landowners’ claims.

In addition to the mention of environmental matters in the “Private Property Assessment Act,” another 1995 law amended the “Montana Environmental Policy Act” to include, as one of its policy aims, the “protect[ion of] the right to use and enjoy private property free of undue government regulation.”²⁷² The amendments also direct all agencies to evaluate the impact of proposed actions on private property rights as part of the environmental impact statement²⁷³ and also to consult with other agencies concerning any regulation of private property that may result from a proposal.²⁷⁴ This statute does not define “private property” or “takings,” does not provide remedies or impose jurisdictional requirements, and does not place any special limitation on the property-concerned information contained within the environmental impact statement.

NORTH DAKOTA: If a state agency proposes a rule that may limit the use of real property, the agency must prepare a written assessment of takings implications.²⁷⁵ The assessment must address the likelihood whether a taking will occur, the purpose, benefits, and costs of the rule, and the potential sources of funds for compensation if such a taking is determined.²⁷⁶ Any landowner whose property is or could be affected by a rule may submit a written request asking that the agency reconsider the rule.²⁷⁷ The agency, having considered the request, must respond to the landowner in writing within thirty days.²⁷⁸ The definition of “real property” referenced in the statute appears to provide a bright-line definition encompassing land, fixtures, and appurtenances,²⁷⁹ but it is ultimately undercut by the generalities derived from judicial pronouncements. A “taking” is the taking of

269. *Id.* § 2-10-103(1).

270. *Id.* § 2-10-103(3).

271. *Id.* § 2-10-103(1).

272. *Id.* § 75-1-103(2)(d).

273. *Id.* § 75-1-201(1)(b)(iv)(D).

274. *Id.* § 75-1-201(1)(c).

275. N.D. Cent. Code § 28-32-02.5(1) (Supp. 1997).

276. *Id.*

277. *Id.* § 28-32-02.5(2).

278. *Id.*

279. *Id.* § 47-01-03 (1987).

private real property by a government action that gives rise to compensation pursuant to the Fifth and Fourteenth Amendments of the United States Constitution or the North Dakota Constitution.²⁸⁰ If an exercise of the state's police power or regulatory power diminishes the value of property by more than fifty percent, the action constitutes a "regulatory taking," *unless* the exercise of state power "substantially advances legitimate state interests, does not deny an owner the economically viable use of the owner's land, or is in accordance with applicable state or federal law."²⁸¹ The involved governmental entities are no further defined than state agencies, and their applicable actions are "proposed rules."²⁸² If a taking occurs after the assessment stage, the statute does not provide any specific remedies or jurisdictional requirements to make a claim. Additionally, there is no limitation placed upon the use of the information in the assessment.

TENNESSEE: Tennessee's Attorney General must establish and annually update a set of guidelines, based on federal and state law, to assist state agencies in identifying and analyzing actions that may result in a taking.²⁸³ In addition, when reviewing rules that are in the process of promulgation, the Attorney General is prohibited from approving any rule that would result in a taking.²⁸⁴ "Private property" is defined as real property, and improvements thereon, which is not owned by the state.²⁸⁵ A "taking" or "unconstitutional taking" is a governmental action that takes private property such that compensation is required by the Fifth or Fourteenth Amendments of the United States Constitution or the Tennessee Constitution.²⁸⁶ The governmental entity to which the statute applies is not specifically defined; "state agencies," however, are the only state entities mentioned in the statute.²⁸⁷ "Government action" is only defined to the extent that it does not include the exercise of eminent domain, actions resulting from a violation of the law, or the discontinuation of government actions.²⁸⁸ The statute of limitations for bringing an action on an unconstitutional taking claim is twelve months from the occurrence of the taking or from the time the owner has knowledge of the taking.²⁸⁹ Though no jurisdictional limitations are placed on takings claims, a private property owner who proves that a government action was an unconstitutional taking is entitled to recover attorney's fees.²⁹⁰ Once the court

280. *Id.* § 28-32-02.5(3) (Supp. 1997).

281. *Id.*

282. *Id.* § 28-32-02.5(1).

283. Tenn. Code Ann. § 12-1-203 (Supp. 1996).

284. *Id.*

285. *Id.* § 12-1-202(2).

286. *Id.* § 12-1-202(3).

287. *Id.* § 12-1-201.

288. *Id.* § 12-1-202(1).

289. *Id.* § 12-1-206; *id.* § 29-16-124.

290. *Id.* § 12-1-205.

determines that the property has declined in value due to a taking, the property taxes on the realty are reduced correspondingly.²⁹¹ Tennessee does not even require a formal written assessment of takings implications, and there is no limitation on the use of takings information gathered by the state.

TEXAS: Texas' Attorney General is required to develop and to update annually guidelines to assist agencies in "identifying and evaluating [actions] that may result in a taking."²⁹² The statute covers state agencies and local governments.²⁹³ A "taking" is an action that falls in one of two categories. The first "taking" category includes government actions affecting property that would require compensation under the Fifth and Fourteenth Amendments of the United States Constitution or the Texas Constitution.²⁹⁴ The second category covers any government action that "restrains or limits the owner's right to the property" and decreases the market value of the affected property by at least 25 percent.²⁹⁵ The statute defines "private real property" as a real property interest recognized by common law, including water rights, which is not owned by the government.²⁹⁶ "Governmental entity" is defined as "a board, commission, council, department, or other agency in the executive branch of state government" or a "political subdivision of this state."²⁹⁷ A governmental entity contemplating an action that may result in a taking must publish notice of the proposed action in a newspaper in the county where affected property is located.²⁹⁸ In addition, the governmental entity must produce a "takings impact assessment," which becomes a public document, evaluating the proposal in light of the Attorney General's guidelines.²⁹⁹ Failure to draft an assessment voids the government action.³⁰⁰ Texas' remedial process is discussed *infra* in part B of the Appendix.³⁰¹

UTAH: Utah created assessment requirements for state agencies and local political subdivisions, but the provisions for each are not identical.³⁰² Each state agency is required to develop and update annually a set of guidelines which aids in determining whether a propo-

291. *Id.* § 12-1-204.

292. Tex. Gov't Code Ann. § 2007.041 (West Supp. 1997).

293. *Id.* § 2007.002(1).

294. *Id.* § 2007.002(5)(A).

295. *Id.* § 2007.002(5)(B).

296. *Id.* § 2007.002(4).

297. *Id.* § 2007.002(1).

298. *Id.* § 2007.042. In addition, according to subsection (b)(2), state agencies must publish a notice in the Texas Register.

299. *Id.* § 2007.043.

300. *Id.* § 2007.044.

301. See *infra* notes 389-395 and accompanying text.

302. 1994 Utah Laws 91 (codified at Utah Code Ann. § 63-90-2 to -4 (Supp. 1996)) (state agencies); Utah Code Ann. § 63-90a-1 to -4 (Supp. 1996) (political subdivisions).

sal will result in an unconstitutional taking.³⁰³ An agency must complete a takings assessment of a proposed action, based on its guidelines, and, if the assessment implicates takings issues, forward the assessment to the Governor and the Legislative Management Committee.³⁰⁴ "Private property" includes real or personal property that is protected by the Fifth or Fourteenth Amendments of the United States Constitution or the Utah Constitution.³⁰⁵ A "constitutional taking" or a "taking" is defined as a governmental action for which compensation would be required by the state or federal constitutions.³⁰⁶ "Governmental actions" include any proposed or emergency rules, licensing or permitting conditions, required dedications or actions, or existing statutes or rules.³⁰⁷ "State agencies" are any officers or units of the state executive branch that have the legal power to adopt rules.³⁰⁸ No specific remedies are provided for those landowners who suffer a taking by a state agency.

Local governmental entities are given a separate charge to develop takings assessment guidelines, but theirs need only apply to cases affecting private real property.³⁰⁹ In addition to the guidelines, local political subdivisions must establish their own review procedures for actions implicating constitutional takings issues.³¹⁰ Any affected landowner must appeal within thirty days after the regulatory decision is issued, and the local entity must decide the appeal within fourteen days thereafter.³¹¹ The definition of "constitutional taking issues" is substantially identical to the definition of a "constitutional taking" under the statute which applies at the state level.³¹² Neither the state level statute nor the local level statute imposes any restrictions upon the use of the information contained in the assessment. Also, neither statute places particular jurisdictional requirements or limitations on takings claims.

In 1997, the Utah legislature created the position of "Private Property Ombudsman" within the Department of Natural Resources in order to provide a central repository of takings knowledge for the state.³¹³ The person hired for the job is to have a background in takings law, develop and maintain an expertise in that area of the law, assist state agencies in guideline development and takings implication analysis, identify state and local actions that have potential takings

303. Utah Code Ann. § 63-90-3 (Supp. 1996).

304. *Id.* § 63-90-4.

305. *Id.* § 63-90-2(3).

306. *Id.* § 63-90-2(1).

307. *Id.* § 63-90-2(2).

308. *Id.* § 63-90-2(4).

309. *Id.* § 63-90a-1(1).

310. *Id.* § 63-90-4(1).

311. *Id.* § 63-90a-4.

312. *Id.* § 63-90a-1(1).

313. 1997 Utah Laws 293 § 1 (codified at Utah Code Ann. § 63-34-13 (LEXIS through 1997 First Special Sess.)).

implications, and advise private property owners and private citizens.³¹⁴ The Ombudsman may also mediate disputes between private property owners and governmental entities, if one of the parties so requests.³¹⁵ The Private Property Ombudsman, however, may not represent any of the parties, including the government in a court proceeding which deals with a takings dispute.³¹⁶

VIRGINIA: In 1995, Virginia amended its Administrative Process Act to require that the economic impact analysis of each proposed regulation include "the impact of the regulation on the use and value of private property."³¹⁷ No definitions of "private property" or "taking" or descriptions of the precise governmental entities to which the assessment applied were included with the particular amendment. There were also no specific remedies, jurisdictional requirements, or limitations on the property-oriented information in the analysis.

In 1993, the Virginia Legislature established a joint subcommittee to study governmental actions affecting private property rights.³¹⁸ Though originally slated to issue its findings in 1994, the subcommittee was extended in 1994³¹⁹ and again in 1995 because it was deemed "prudent for the joint subcommittee to continue its study of this evolving area of law in order to evaluate how any changes may effect [sic] private property rights in Virginia."³²⁰ The committee's report finally came out in 1997 with the conclusion that "it would be too speculative to attempt to predict the actions of Congress with regard to private property rights."³²¹ Therefore, the committee made no recommendations.³²² One piece of property rights legislation died in committee in 1996,³²³ and a House Joint Resolution calling for property rights was not carried over when the legislature adjourned in June 1997.³²⁴

WASHINGTON: In 1991, Washington's Attorney General was required to create "an orderly, consistent process," possibly including a checklist, by which state agencies and local governments would evaluate proposed actions to determine if such actions resulted in an uncon-

314. *Id.* (codified at Utah Code Ann. § 63-34-13(3) (LEXIS through 1997 First Special Sess.)).

315. *Id.* (codified at Utah Code Ann. § 63-34-13(3)(g) (LEXIS through 1997 First Special Sess.)).

316. *Id.* (codified at Utah Code Ann. § 63-34-13(4) (LEXIS through 1997 First Special Sess.)).

317. Va. Code Ann. § 9-6.14:7.1(G) (Michie Supp. 1997).

318. H.J. Res. 624, Va. G.A. Sess. (1993).

319. H.J. Res. 74, Va. G.A. Sess. (1994).

320. H.J. Res. 26, Va. G.A. Sess. (1995).

321. Final Report of the Joint Subcomm. Studying Governmental Actions Affecting Private Property Rights, House Doc. No. 2, at 4 (Va. 1997).

322. *Id.* at 5.

323. H.B. 1210, Va. G.A. Sess. (1996).

324. H.J.R. 564, Va. G.A. Sess. (1997).

stitutional taking.³²⁵ The Attorney General must review and annually update the process to assure that it is consistent with current law.³²⁶ The statute applies to state agencies and local governments with proposed regulatory and administrative actions. Neither "property" nor "taking" was defined in the statute. The evaluation process is protected by attorney-client privilege, and no private right of action is available to force compliance with the section.³²⁷ Additionally, no jurisdictional requirements or limitations are imposed by the statute.

The legislature also passed the "Private Property Regulatory Fairness Act" in 1995. The law stated that any "regulation of private property or restraint of land use by a governmental entity" was prohibited unless the entity made public its analysis of the proposal's "total economic impact in [sic] private property" at least thirty days in advance.³²⁸ When any "portion or parcel of private property" was "taken for general public use," which occurred any time a governmental entity regulated or imposed a land use restraint on the property for any reason other than to avoid a public nuisance, the regulator was required to compensate the property owner for the full reduction in value.³²⁹ "Private property" included land, interests therein, improvements thereon, water rights, and any harvestable or extractable resources that were not owned by the government and were protected by the Fifth or Fourteenth Amendments of the United States Constitution or the Washington Constitution.³³⁰ "Governmental entity" included the state, its agencies, and any agencies or commissions fully or partially funded by any political subdivision within the state.³³¹ Due to the statute's breadth and potential expense, however, the voters repealed the "Private Property Regulatory Fairness Act" through "Referendum 48" in November of 1995.³³²

WEST VIRGINIA: The statute applies only to the West Virginia Department of Environmental Protection. The department is required to prepare an assessment of any proposed action "that is reasonably likely to deprive a private real property owner of . . . property . . . or . . . of all productive use of his or her private real property,"³³³ but only if the state or federal supreme court has required compensation to be paid in a similar case.³³⁴ The statute also permits a court to award attorney's fees to a private property owner if it finds that com-

325. Wash. Rev. Code Ann. § 36.70A.370(1), (2) (West Supp. 1997).

326. *Id.* § 36.70A.370(1).

327. *Id.* § 36.70A.370(4).

328. 1995 Wash. Laws 98 § 3.

329. *Id.* § 4.

330. *Id.* § 7(3).

331. *Id.* § 7(2).

332. See Grant Moos, *Washington: Voters Reject Restrictive Property Rights Measure*, 1995 WL 907146, Nov. 27, 1995.

333. W. Va. Code Ann. § 22-1A-3(a) (1996).

334. *Id.* § 22-1A-3(a).

pensation for a departmental action is required by the federal or state constitution and finds that the department either failed to perform the required assessment, or performed it but concluded that compensation was unnecessary.³³⁵ No terms are defined in the statute.

WYOMING: The Attorney General is required to develop a checklist and guidelines to assist state agencies in evaluating actions that may result in an unconstitutional taking.³³⁶ In addition to using the guidelines to evaluate administrative actions, state agencies must also make sure that any conditions imposed on the issuance of a permit directly relate to, and substantially advance the purpose of the permit.³³⁷ The statute defines "taking" as "an uncompensated taking of private property in violation of the state or federal constitution."³³⁸ It also includes a definition of "constitutional implications": the taking of property in violation of the federal or state constitution, as determined by the Attorney General based on current law.³³⁹ "Private property" is property protected by the Fifth and Fourteenth Amendments of the United States Constitution and the Wyoming Constitution.³⁴⁰ "Government agency" is defined as "the state of Wyoming and any officer, agency, board, commission, department or similar body of the executive branch of state government."³⁴¹ No mention is made of the admissibility of the guidelines or evaluations if the landowner brings suit in court.

B. *Statutes Creating a Compensation Scheme/Remedial Process for Aggrieved Landowners*

ARIZONA: Arizona established an administrative appeal process,³⁴² but it is limited to appeals of a "dedication or exaction" imposed as part of the administrative approval of "the use, improvement or development of real property."³⁴³ None of the terms used in the statute are defined specifically. The local government must designate a hearing officer and notify the landowner of his nonwaivable right to appeal.³⁴⁴

335. *Id.* § 22-1A-5.

336. Wyo. Stat. Ann. § 9-5-303 (Michie 1995).

337. *Id.* § 9-5-304.

338. *Id.* § 9-5-302(a)(v).

339. *Id.* § 9-5-302(a)(i).

340. *Id.* § 9-5-302(a)(iv).

341. *Id.* § 9-5-302(a)(ii).

342. The legislature enacted separate provisions with one imposing the appeal requirement on cities and towns, and the other imposing the identical requirement on counties. For ease of reference, the text will refer to the entities collectively as "local governments" and the footnotes will cite to both statutory provisions.

343. H.B. 42-2229, 1st Sess. § 1(A) (Ariz. 1995) (city) (codified at Ariz. Rev. Stat. Ann. § 9-500.12(A) (West 1996)); *id.* § 2(A) (county) (codified at Ariz. Rev. Stat. Ann. § 11-810(A) (West Supp. 1997)).

344. *Id.* § 1(A), (C) (city) (codified at Ariz. Rev. Stat. Ann. § 9-500.12(A), (C) (West 1996)); *id.* § 2(A), (C) (county) (codified at Ariz. Rev. Stat. Ann. § 11-810(A), (C) (West Supp. 1997)).

Appeals must be filed within thirty days of the decision, heard within thirty days of receipt, and decided within five days after the hearing.³⁴⁵ The government entity bears the burden of showing that "an essential nexus" exists between the exaction and "a legitimate governmental interest"³⁴⁶ and that the proposal is "roughly proportional to the impact of the proposed use."³⁴⁷ Modification or deletion of the exaction are the only available remedies and if the hearing officer does not completely remove the exaction, the owner may appeal to superior court for a trial *de novo*.³⁴⁸ The court may award damages and attorney's fees in appropriate circumstances.³⁴⁹ Arizona's evaluation and study requirements are discussed *supra* in part A.³⁵⁰

FLORIDA.³⁵¹ Florida created a new cause of action, "separate and distinct . . . from the law of takings,"³⁵² for actions of government entities that constitute an "inordinate burden" on private real property interests. The covered governmental entities include agencies of the state, regional and local governments, except those that exercise power based on a formal delegation of authority from the federal government.³⁵³ "Real property" includes land and "any appurtenances and improvements to the land."³⁵⁴ The definition of "inordinate burden" is an amalgamation of classic phrases from the Supreme Court takings cases. The Court has explained that a taking occurs when a restriction of the use of real property renders an owner:

permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use . . . or . . . is left with existing or vested uses that are unreasonable such that the property owner bears permanently a dis-

345. *Id.* § 1(C), (D), (F) (city) (codified at Ariz. Rev. Stat. Ann. § 9-500.12(C), (D), (F) (West 1996)); *id.* § 2(C), (D), (F) (county) (codified at Ariz. Rev. Stat. Ann. § 11-810(C), (D), (F) (West Supp. 1997)).

346. *Id.* § 1(E) (city) (codified at Ariz. Rev. Stat. Ann. § 9-500.12(E) (West 1996)); *id.* § 2(E) (county) (codified at Ariz. Rev. Stat. Ann. § 11-810(E) (West Supp. 1997)). The "essential nexus" burden is derived from *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-37 (1987).

347. *Id.* § 1(E) (city) (codified at Ariz. Rev. Stat. Ann. § 9-500.12(E) (West 1996)); *id.* § 2(E) (county) (codified at Ariz. Rev. Stat. Ann. § 11-810(E) (West Supp. 1997)). The "rough proportionality" burden is derived from *Dolan v. City of Tigard*, 504 U.S. 374, 384 (1994).

348. *Id.* § 1(G) (city) (codified at Ariz. Rev. Stat. Ann. § 9-500.12(G) (1996)); *id.* § 2(G) (county) (codified at Ariz. Rev. Stat. Ann. § 11-810(G) (West Supp. 1997)).

349. *Id.* § 1(H) (city) (codified at Ariz. Rev. Stat. Ann. § 9-500.12(H) (1996)); *id.* § 2(H) (county) (codified at Ariz. Rev. Stat. Ann. § 11-810(H) (West Supp. 1997)).

350. See *supra* notes 197-202 and accompanying text.

351. For an detailed analysis of the Florida statute, see David L. Powell, et al., *A Measured Step to Protect Private Property Rights*, 23 Fla. St. U. L. Rev. 255 (1995).

352. Fla. Stat. Ann. § 70.001(1) (West Supp. 1997).

353. *Id.* § 70.001(3)(c).

354. *Id.* § 70.001(3)(g).

proportionate share of a burden imposed for the good of the public

...³⁵⁵

If a landowner believes she has been inordinately burdened, she must file an administrative complaint to the agency responsible for imposing the burden before she can go to court. The complaint must include an appraisal showing the diminution in her property's value.³⁵⁶ The owner and the agency then have 180 days in which to negotiate, and the agency must begin by making a written settlement offer, which can offer modifications to the owner's proposed development or the agency's original decision, or can simply stand pat.³⁵⁷ If the agency chooses not to change its original action, or if the owner rejects the agency's settlement offer, the agency must issue the owner a written "ripeness decision," describing all the lawful uses to which the property may be put. The statute explicitly describes the ripeness decision as "the last prerequisite to judicial review."³⁵⁸ If the owner is dissatisfied with the settlement offer and the ripeness decision, she may file a compensation claim in the circuit court where the affected property is located.³⁵⁹ The court is required to consider the agency's settlement offer and ripeness decision in determining whether or not the owner was inordinately burdened.³⁶⁰ If the owner wins and the court decides the agency did not make a bona fide settlement offer, the owner may recover attorney's fees and costs;³⁶¹ if the court, however, determines that the owner rejected a bona fide settlement that offered a fair resolution, she could be ordered to pay the agency's fees and costs.³⁶²

IDAHO: In addition to its takings assessment requirements,³⁶³ Idaho provides two remedies for a landowner affected by a local planning or zoning decision.³⁶⁴ Any person with an interest in real property "which may be adversely affected by the issuance or denial" of a developmental permit may petition the decisionmaking body to hold a

355. *Id.* § 70.001(3)(e). The concept of "distinct investment-backed expectations" first appeared in *Penn. Central Transp. Co. v. New York*, 438 U.S. 104, 127 (1977), but the Court never really attempted to explain fully its meaning. See Daniel R. Mandelker, *Land Use Law* §§ 2.13, 2.18 (3d ed. 1993). The unfairness of asking an individual to bear a disproportionate share of the burden was most recently noted in *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2316 (1994).

356. Fla. Stat. Ann. § 70.001(4)(a) (West Supp. 1996).

357. *Id.* § 70.001(4)(c).

358. *Id.* § 70.001(5)(a).

359. *Id.* § 70.001(5)(b).

360. *Id.* § 70.001(6)(b).

361. *Id.* § 70.001(6)(c)(1).

362. *Id.* § 70.001(6)(c)(2).

363. The assessment requirements were discussed in the Idaho segment of part A of this Appendix.

364. 1997 Idaho Sess. Laws 199 does not explicitly state that the law applies only to local governments. The bill amends the zoning/planning provisions of the Idaho Code, however, and those provisions do not apply to state agencies. Idaho Code § 67-6503 (1989).

hearing regarding that permit, if no hearing has yet been held.³⁶⁵ After the governing body makes its decision and within twenty-eight days after all remedies provided for in the local ordinance have been exhausted, an injured property owner may seek judicial review.³⁶⁶ Alternatively, if the property owner wishes to claim "'just compensation' for a perceived 'taking,'" ³⁶⁷ based on the premise that the decision on the permit was actually a regulatory action tantamount to eminent domain, the owner may bypass the petition for a hearing and institute an inverse condemnation action.³⁶⁸

LOUISIANA: If an owner of "private agricultural property" believes that a twenty percent or greater diminution in the fair market value of that land has occurred, the landowner may bring suit against the governmental entity whose action caused such a precipitous decline.³⁶⁹ In the case of agricultural land, which is used and assessed as such,³⁷⁰ the owner may bring suit in a state court with jurisdiction over the property "to determine whether the governmental action caused a diminution in value."³⁷¹ The agricultural property owner, however, has the burden of showing that the diminution is not a result of a use that had been previously prohibited.³⁷² Also the agricultural landowner and governmental entity are encouraged to seek mediation and may in the end be required to engage in such a process by the court.³⁷³ A prevailing agricultural landowner may be awarded costs and attorney's fees and may either take the value of the diminution and keep title or may take the full fair market value of the land before diminution occurred and transfer title to the governmental entity.³⁷⁴ If the agricultural landowner wins and the governmental entity rescinds or repeals the diminution-causing rule as a result of the court's decision, the government remains liable only for damages caused by the application of the rule.³⁷⁵ The remedy available to owners of forest land is more limited than that available to agricultural landowners.³⁷⁶ Owners of forest land have a cause of action in district court against the governmental entity for damages only.³⁷⁷ In other words, the forest land-

365. *Id.* § 67-6521(1)(a)-(b) (Supp. 1997).

366. *Id.* § 67-6521(1)(d).

367. *Id.* § 67-6521(2)(b). "Just compensation" and "taking" are in quotation marks in the statute, but are not defined either explicitly or by reference.

368. *Id.*

369. La. Rev. Stat. Ann. § 3:3610 (West Supp. 1997) (agricultural land); *id.* § 3:3623 (forest land). Louisiana's takings assessment requirements and the definitions of terms used in the statute are discussed in the Louisiana segment of part A of this Appendix.

370. *Id.* § 3:3602(15).

371. *Id.* § 3:3610(A)-(B).

372. *Id.* § 3:3610(A).

373. *Id.* § 3:3610(C).

374. *Id.* § 3:3610(D)-(E).

375. *Id.* § 3:3610(F).

376. *Id.* § 3:3623.

377. *Id.* § 3:3623(A)-(B).

owner can recover costs, attorney's fees, and "a sum equal to the diminution in value," but must retain title and is not entitled to have the government buy the land outright.³⁷⁸ "[S]ubsequent repeal or rescission by the governmental entity" does not preclude the owner from recovering all of the court's award.³⁷⁹

MAINE: Maine established a voluntary mediation program³⁸⁰ for landowners who have "suffered significant harm as a result of a governmental action regulating land use."³⁸¹ State agencies are required, when requested, to participate in the mediation program³⁸² while municipalities are not.³⁸³ The landowner may not seek mediation until he has exhausted administrative avenues. To reach mediation, the landowner must have either (1) "sought and failed to obtain a permit, variance or special exception and has pursued all reasonable avenues of [an] administrative appeal" in a municipal action or (2) in a state action, "sought and failed to obtain governmental approval for [such] land use" by the property owner and has a right to judicial review based on final agency action or failure to act.³⁸⁴ There is no specific remedy set forth in the statute; the purpose of mediation is to facilitate "a mutually acceptable solution."³⁸⁵ Commencement of mediation tolls any filing deadline for judicial review of the disputed governmental action.³⁸⁶ Statements made during mediation are admissible in court as allowed by the Maine Rules of Evidence.³⁸⁷ Maine's assessment requirements are discussed *supra* in part A of the Appendix.³⁸⁸

TEXAS: In addition to imposing evaluation and assessment requirements, Texas created a right of action for landowners who were victims of a taking by state or local government.³⁸⁹ The provisions of the statute are not exclusive, the remedies provided are available "in addition to other procedures or remedies provided by law."³⁹⁰ The land-

378. *Id.* § 3:3623(C)-(D).

379. *Id.* § 3:3623(E).

380. H.P. 117-1188, 2nd Sess. § 5(14) (Me. 1996) (codified at 5 Me. Rev. Stat. Ann. tit. 5, § 3341(3) (West Supp. 1996)). It might be more accurate to call it a temporary voluntary mediation program. The statute repeals the program on October 1, 2001. *Id.* (codified at 5 Me. Rev. Stat. Ann. tit. 5, § 3341(14) (West Supp. 1996)).

381. *Id.* § 5(3)(A) (1996) (codified at Me. Rev. Stat. Ann. tit. 5, § 3341(3) (West Supp. 1996)).

382. *Id.* § 1 (codified at Me. Rev. Stat. Ann. tit. 2, § 8 (West Supp. 1996)).

383. *Id.* § 5(8) (codified at Me. Rev. Stat. Ann. tit. 5, § 3341(8) (West Supp. 1996)).

384. *Id.* § 5(3)(C)(1)-(2) (codified at Me. Rev. Stat. Ann. tit. 5, § 3341(3)(C)(1)-(2) (West Supp. 1996)).

385. *Id.* § 5(6) (codified at Me. Rev. Stat. Ann. tit. 5, § 3341(6) (West Supp. 1996)).

386. *Id.* § 5(5) (codified at Me. Rev. Stat. Ann. tit. 5, § 3341(5) (West Supp. 1996)).

387. *Id.* § 5(10) (codified at Me. Rev. Stat. Ann. tit. 5, § 3341(10) (West Supp. 1996)).

388. See *supra* notes 244-45 and accompanying text.

389. For the statutory definition and discussion of the assessment requirements, see *supra* notes 292-300 and accompanying text.

390. Tex. Gov't Code Ann. § 2007.006(a) (West Supp. 1996).

owner may file suit against a local government entity in district court in the county where the affected property is located, but the property owner must file within 180 days of the date he knew or should have known of the adverse impact on his property.³⁹¹ If a state agency is the defendant, the owner must file a contested case with the state agency within the same 180 day time limit.³⁹² The sole remedy for a taking is invalidation of the governmental action;³⁹³ however, the court is required to calculate damages from the taking, and the government may elect to pay the damages in lieu of invalidation.³⁹⁴ The prevailing party, whether the landowner or the government, is entitled to attorney's fees and costs.³⁹⁵

391. *Id.* § 2007.021.

392. *Id.* § 2007.022(a)-(b). The complainant is entitled to a *de novo* appeal of the agency's decision in the district court. *Id.* § 2007.025(b).

393. *Id.* § 2007.023(b).

394. *Id.* § 2007.024(b)-(c). Subsection (e) provides that if the government fails to pay the damages within thirty days after the entry of the final order, the court shall reinstate its order rescinding the governmental action. *Id.* § 2007.024(e)

395. *Id.* § 2007.026.

Notes & Observations